SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 289

UNITED STATES OF AMERICA, APPELLANT,

vs.

JAMES VERNON TURLEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

INDEX

A [Caption omitted].

1 IN UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND
THE UNITED STATES

vs.

JAMES VERNON TURLEY

CRIMINAL DOCKET 23513

For Defendant: Fenton L. Martin (App. by Court).

DOCKET ENTRIES

1956

Feb. 17, Criminal Information for Vio. U.S.C., Title 18, Sec. 2312, filed. (Interstate transportation of stolen motor vehicle).

Feb. 17, Waiver of Indictment, filed.

Feb. 17, App. of Fenton L. Martin, Esq., on behalf of Defendant (App. by Court) Order, filed.

Feb. 17, Motion of Defendant to Dismiss, filed.

Feb. 24, Oral motion of Defendant in open Court to be released on bail pending hearing of Motion to dismiss by the Court.

Feb. 24, Defendant to be released on his own recognizance upon condition that he return to his duty station at Fort Meade, Md.

Feb. 29, Hearing on Defendant's motion to dismiss before Thomsen, C. J.—argued and held sub-curia.

2 1956

Apr. 19, Motion of United States of America to Amend Information, Consent of Defendant, and Order (Thomsen, C. J.) granting said motion, filed.

Apr. 19, Amended Information, filed.

Apr. 19, Motion of Defendant to Dismiss Amended Information, filed.

May 18, Opinion and Order (Thomsen, C. J.) granting motion of Defendant to Dismiss the Information, filed.

May 18, Order (Thomsen, C. J.) "DISMISSING" Amended Information, filed.

June 11, Plaintiffs Notice of Appeal to the Supreme Court of the United States, filed.

3 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted]

INFORMATION—filed February 17, 1956

The United States Attorney for the District of Maryland charges:

On or about January 20, 1956, at Columbia, South Carolina,

JAMES VERNON TURLEY

did lawfully obtain possession of a certain 1955 Ford automobile from its owner, Charles T. Shaver, with permission of said owner to use the automobile briefly on that day to transport certain persons to their homes in Columbia, South Carolina, but after so obtaining possession of the automobile, JAMES VERNON TURLEY, without permission of the owner, and with intent in South Carolina to steal the 1955 Ford automobile, did convert the same to his own use and did unlawfully transport it in interstate commerce from Columbia, South Carolina, to Baltimore in the State and District of Maryland, knowing it to have been stolen, where he did on January 21, 1956, sell said 1955 Ford automobile, without permission of the owner.
18 U.S.C. 2312

George Cochran Doub
United States Attorney

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4 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF INDICTMENT—filed February 17, 1956

James Vernon Turley, the above named defendant, who is accused of transporting in interstate commerce from Columbia, S. C., to Baltimore, Md., a 1955 Ford automobile

on or about January 20, 1956, he then knowing the said automobile to have been stolen, in violation of 18 U.S.C. 2312, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

James Vernon Turley, Defendant.

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Witness.

Fenton L. Martin, Counsel for Defendant.

Date February 17, 1956.

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5 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—filed February 17, 1956

The Defendant, James Vernon Turley, by his attorney, Fenton L. Martin, moves that the information be dismissed on the ground that it does not state facts sufficient to constitute an offense against the United States.

Fenton L. Martin, Attorney for the Defendant, James Vernon Turley

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6 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO AMEND INFORMATION—filed April 19, 1956

Pursuant to Criminal Rule 7(e), the United States of America hereby moves to amend its information previously filed in the above case by substituting therefor the information hereto attached.

George Cochran Doub, United States Attorney
William F. Mosner, Assistant United States Attorney

James Vernon Turley, defendant, through his attorney, Fenton L. Martin, Esq., hereby consents to the above motion, and renews his previously-filed Motion to Dismiss.

Fenton L. Martin, Attorney for Defendant

ORDER

Ordered this 19th day of April, 1956, that the above motion to amend is hereby granted.

Roszel C. Thomsen, Chief Judge, United States District Court

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7 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED INFORMATION—filed April 19, 1956

The United States Attorney for the District of Maryland charges:

On or about January 20, 1956, at Columbia, South Carolina,

JAMES VERNON TURLEY

did lawfully obtain a certain 1955 Ford automobile from its owner, Charles T. Shaver, with permission of said owner to use the automobile briefly on that day to transport certain of their friends to the homes of the latter in Columbia, South Carolina, and to return with them, but after so obtaining the automobile and transporting said persons to their homes, and before returning with them or delivering back the automobile to its owner, James Vernon Turley, without permission of the owner, and with intent in South Carolina to steal the 1955 Ford automobile, did convert the same to his own use and did unlawfully transport it in interstate commerce from Columbia, South Carolina, to Baltimore in the State and District of Maryland, knowing it to have been stolen, where he did on January 21, 1956, sell said 1955 Ford automobile without permission of the owner.

George Cochran Doub, United States Attorney

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8 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—filed April 19, 1956

The Defendant, James Vernon Turley, by his attorney, Fenton L. Martin, moves that the amended information

filed by the United States of America in the above entitled case be dismissed on the ground that it does not state facts sufficient to constitute an offense against the United States.

Fenton L. Martin, Attorney for Defendant, James Vernon Turley.

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9 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
UNITED STATES OF AMERICA

v.

JAMES VERNON TURLEY

CRIMINAL No. 23513

OPINION—filed May 18, 1956

Thomsen, Chief Judge

The motion to dismiss the information in this case raises the question whether an automobile is "stolen", within the meaning of Title 18 U.S.C.A. sec. 2312, if the defendant obtained possession from the owner lawfully, but thereafter, and before he drove it across the state line, decided to convert it to his own use. That question has troubled the courts and the enforcement agencies for many years; the amended information in this case was drawn to raise it squarely; and the United States Attorney and court appointed counsel for the defendant have briefed it fully and ably.

The information charges:

> "On or about January 20, 1956, at Columbia, South Carolina, James Vernon Turley did lawfully obtain a certain 1955 Ford automobile from its owner, Charles T. Shaver, with permission of said owner to use the automobile briefly on that day to transport certain of their friends to the homes of the latter in Columbia, South Carolina, and to return with them, but after so obtaining the automobile and transporting said persons to their homes, and before returning with them or delivering back the automobile to its owner, James Vernon

Turley, without permission of the owner, and with intent in South Carolina to steal the 1955 Ford automobile, did convert the same to his own use and did unlawfully transport it in interstate commerce from Columbia, South Carolina, to Baltimore in the State and District of Maryland, knowing it to have been stolen, where he did on January 21, 1956, sell said 1955 Ford automobile without permission of the owner. 18 U.S.C. 2312."

Sec. 3 of the National Motor Vehicle Theft (Dyer) Act, as passed by Congress Oct. 29, 1919, 41 Stat. 324, 325, provided: "That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished * * *".

In its present form, as amended in 1945, it provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years or both." 18 U.S.C.A. sec. 2312.

The problem is: did Congress intend the word "stolen" to mean "taken under circumstances which amount to common law larceny"; if not, what did Congress intend the word "stolen" to mean; if so, do the facts charged amount to common law larceny.

1. Should the word "stolen" be given a uniform meaning throughout the country?

Two circuits have answered this question "yes", and have held that criminal liability under the Dyer Act should not depend upon the meaning given to the word "stolen" by the law of the state where possession of the automobile was obtained or the interstate transportation began. *Hite v. U.S.*, (10 Cir.) 168 F.2d 973; *Ackerson v. U.S.*, (8 Cir.) 185 F.2d 485. In the absence of a plain indication to the contrary, the meaning of a statute should not depend on state law. Uniformity is the primary consideration. *Jerome v. U.S.*, 318 U.S. 101; *U.S. v. Handler*, (2 Cir.) 142 F.2d 351, 354. When Congress has desired to incorporate state laws into federal statutes, it has done so specifically: e.g. 18 U.S.C.A. secs. 43, 1073, 1262, 5001; 15 U.S.C.A. sec. 715 b.

In most of the opinions which have considered the Dyer Act, it seems to have been assumed that the word "stolen" should have a uniform meaning throughout the country, and should not depend upon the law of the state where the automobile was taken from the owner. In *Hite v. U.S.* and *Ackerson v. U.S., supra,* the point was expressly decided.

2. Did Congress intended the word "stolen" to mean "taken under circumstances which amount to common law larceny"?

The primary purpose of the Dyer Act was to combat effectively the rising traffic in stolen cars by organized groups of thieves and dealers operating across state lines; this traffic usually involves common law larceny. In the House debate, Mr. Dyer said: "It provides for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." 58 Cong. Rec., Part 6, p. 5472. In the Senate debate, discussing a phrase, subsequently deleted, from sec. 4, "that whoever shall, *with the intent to deprive the owner of the possession thereof,* receive, etc.", Senator Nelson noted that the italicized phrase was surplusage, because one of the elements of the offense of stealing was deprivation of the owner of the thing stolen without his consent, and that this was a "textbook" definition. 58 Cong. Rec., Part 7, p. 6434. Senator Nelson evidently was referring to common law larceny, and not to the hodge-podge of State statutes dealing with the subject.

The Tenth, Eighth and Fifth Circuits have held that the word "stolen", as used in the Dyer Act, requires proof of common law larceny. *Hite v. U.S.,* (10 Cir.) 168 F.2d 973; *Ackerson* v. *U.S.,* (8 Cir.) 185 F.2d 485; *Murphy* v. *U.S.,* (5 Cir.) 206 F.2d 571. In *Ex parte Atkinson,* (E.D.S.C.) 84 F. Supp. 300, in our circuit, Judge Wyche came to the same conclusion. See also *U.S. v. Bucur,* (7 Cir.) 194 F.2d 297; *U.S. v. Kratz,* (D.C. Neb.) 97 F. Supp. 1001; *U.S. v. O'Carter,* (D.C.S.D. Iowa) 91 F. Supp. 544.

The only Circuit which has expressly held the contrary is the Sixth Circuit, where a district court decision, *U.S. v. Adcock,* 49 F. Supp. 351, has been followed by later cases

in the Court of Appeals; *Davilman v. U.S.*, 180 F.2d 284; *Collier v. U.S.*, 190 F.2d 473; *Wilson v. U.S.*, 214 F.2d 313; *Bruce v. U.S.*, 218 F.2d 819.

In *U.S. v. Sicurella*, (2 Cir.) 187 F.2d 533, the court said:

> "Defendants say that a conviction under the Dyer Act cannot stand unless there is evidence sufficient to prove larceny under the narrowest definition of that crime at common law. Such a contention would not help the defendants even if it were sound—which we do not intend to intimate—for a narrow common law definition is not required under the Dyer Act. See Davilman v. United States, 6th Cir., 180 F.2d 284; Stewart v. United States, 8 Cir., 151 F.2d 386; Loney v. United States, 10 Cir., 151 F.2d 1. Moreover, it was always larceny when there was an intent at the time a bailee acquired possession of the property of another to convert it to his own use and the bailee thereafter did convert it and the owner had given over the prope with no intention that title should pass. See e.g., te v. United States, 10 Cir., 168 F.2d 973; United States v. Patton, 3 Cir., 120 F.2d 73; Reg. v. Ashwell, 16 Q.B.D. 190."

It should be noted that *Davilman* is the only case cited by the Second Circuit which holds that the Dyer Act applies to anything except common law larceny. The other cases cited deal with the question whether the facts alleged or proved amounted to larceny, which will be discussed below.

Aside from the Dyer Act, the Federal courts have often held that when a Federal criminal statute uses a term known to the common law and does not define that term, the courts will apply the common law meaning of the term unless the context indicates a contrary intent on the part of Congress.[1]

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[1] *U.S. v. Brandenburg*, (3 Cir.) 144 F.2d 656 (burglary); *U.S. v. Patton*, (3 Cir.) 120 F.2d 73 (larceny); *Harrison v. U.S.*, 163 U.S. 140 (robbery); *U.S. v. Carll*, 105 U.S. 611 (forgery); *U.S. v. Smith*, 5 Wheat. 153 (piracy); *U.S. v. Palmer*, 3 Wheat. 610 (robbery); *U.S. v. Outerbridge*, Fed. Cas. No. 15,978 (murder); *U.S. v. Armstrong*, 2 Curt. 451, Fed. Cas. No. 14,467 (manslaughter); *In re Greene*, (CC.

The constitutional objection to vagueness and uncertainty in criminal statutes is avoided by the rule that an undefined term having a meaning at common law assumes that meaning when used in a statute. *U.S. v. Miller,* (W.D.Ky.) 17 F. Supp. 65. See also Crawford, *The Construction of Statutes,* sec. 228: "If a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted * * * And there is a presumption that the lawmakers did not intend to abrogate or alter it in any manner * * *".

Black's Law Dictionary says "steal", besides being commonly used in indictments for larceny, may denote the criminal taking of personal property either by larceny, embezzlement or false pretenses, and may include the unlawful appropriation of things which are not technically the subject of larceny. This is probably the common, everyday meaning of the word, but the holding of the Tenth, Eighth, and Fifth Circuits that the term "steal", when used in a criminal statute and undefined by the text, refers to common law larceny, is supported by the weight of authority in State courts.[2]

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When Congress has intended to cover misappropriations other than common law larceny, it has used language appropriate to indicate such intention.[3] In *U. S. v. Morgan,*

S.D.Ohio) 52 Fed. 104; *U.S. v. Cardish,* (D.C.E.D.Wisc.) 143 Fed. 640 (arson); *U.S. v. Coppersmith,* (C.C.W.D. Tenn.) 4 Fed. 198 (felony); *U.S. v. Clark,* (D.Alaska) 46 Fed. 633; *U.S. v. Altmeyer,* (D.C.W.D.Pa.) 113 F. Supp. 854 (extortion).

[2] See, for example, *State v. Frost,* (Mo. Sup.), 289 S.W. 895; *Hughes v. Territory,* 8 Okla. 28, 56 P. 708; *Cohoe v. State,* 79 Neb. 811, 113 N.W. 532; *Satterfield v. Commonwealth,* 105 Va. 867, 52 S.E. 979; *State v. Richmond,* 228 Mo. 362, 128 S.W. 744; *Gardener v. State,* 55 N.J.L. 17; *State v. Fair,* 35 Wash. 127, 76 P. 731.

[3] 18 U.S.C.A. sec. 641: "embezzles, steals, purloins, or knowingly converts * * *" (public money, property or records); 18 U.S.C.A. sec. 642: "secretes within, or embezzles, or takes and carries away * * *" (tools and materials of U.S. for counterfeiting purposes); 18 U.S.C.A. sec. 655: "steals or unlawfully takes, or unlawfully conceals

(D.Ark.) 98 F. Supp. 558, the court, construing 18 U.S.C.A. sec. 659, noted that the breadth of the language used in that statute made inapplicable the strict construction of the Dyer Act given in *Hite v. U.S.*, (10 Cir.) 168 F.2d 973. Cf. *United States v. Stone*, 8 Fed. 232; *United States v. Jolly*, 37 Fed. 108; *Crabb v. Zerbst*, 99 F.2d 562; *United States v. Handler*, 142 F.2d 351; *Morrisette v. U.S.*, 342 U.S. 246.

14 Some states have passed statutes broadening the definition of larceny and wiping out the distinctions between the old common law crimes. But there has been no uniformity in such statutes, and the offense of common law larceny still exists in many of those states.[4]

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* * *" (theft by bank examiner); 18 U.S.C.A. sec. 656: "embezzles, abstracts, purloins, or wilfully misapplies * * *" (theft by bank employe); 18 U.S.C.A. sec. 657: "embezzles, abstracts, purloins, or wilfully misapplies * * *" (theft by employee of credit, etc., company); 18 U.S.C.A. sec. 658: "conceals, removes, disposes of, or converts * * *" (employee of farm credit agency); 18 U.S.C.A. sec. 659: "embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains * * *" (baggage moving in commerce); 18 U.S.C.A. sec. 660: "embezzles, steals, abstracts, or wilfully misapplies * * *" (funds of carrier); 18 U.S.C.A. sec. 663: "embezzling, stealing, or purloining such gift, or converting the same * * *" (money solicited for United States); 18 U.S.C.A. sec. 1704: "steals, purloins, embezzles, or obtains by false pretenses * * *" (keys or locks—mail containers); 18 U.S.C.A. sec. 1707: "steals, purloins, or embezzles * * * or appropriates * * * to * * * any other than its proper use * * *" (post office property); 18 U.S.C.A. sec. 1708: "steals, takes, or abstracts, or by fraud or deception obtains * * *" (mail matter); 18 U.S.C.A. sec. 2314: "knowing the same to have been stolen, converted or taken by fraud * * *" (transportation of articles used in counterfeiting); 18 U.S.C.A. sec. 2315: "knowing the same to have been stolen, unlawfully converted, or taken * * *" (sale or receipt of such articles).

[4] In South Carolina, where the transactions in the case at bar took place, the court has held that "when the possession of property has been legally obtained, and thereafter fraud-

I conclude that in the Dyer Act and in the current amendment thereto Congress used the term "stolen" to imply a taking which amounts to common law larceny, not "under the narrowest definition of that crime at common law", but as "common law larceny" has been understood in the United States.

3. Do the facts alleged amount to common law larceny?

U.S. v. Patton, (3 Cir.) 120 F.2d. 73, discusses some general principles:

> " 'Larceny, at common law, is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein.' Clark's Cr. Law (3rd Ed.) 305. One of the essential elements of the crime is that the taking is by trespass, that is, without the consent of the owner. So in Reg. v. Ashwell, 16 Q.B.D. 190, A. L. Smith, J., said (p. 195): 'To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such

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ulently converted to his own use by the person having the possession, an indictment at common law will not lie, because larceny at common law, is an offense against the possession of property." *State v. Posey,* 70 S.E. 612, 88 S.C. 313 (1911). Like some other states South Carolina has passed a statute, S.C. Code Annd. 16-365, which provides: "Breach of trust with fraudulent intent. Any person committing a breach of trust with a fraudulent intention shall be held guilty of larceny, and so shall any person who shall hire or counsel any other person to commit a breach of trust with a fraudulent intention."

Under the South Carolina statute therefore, Turley would have been guilty of larceny, but he would not have been guilty of common law larceny, as that term has been understood in South Carolina.

circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law.' " (120 F.2d at 75).

In *Moore v. U.S.*, 160 U.S. 268, the Supreme Court said:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or into whose hands it has lawfully come, and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have have existed at the time of the taking."

The common law with respect to larceny by servants, agents and bailees went through a long period of development. See discussions in *Commonwealth v. Ryan*, 155 Mass. 523 (1892); *Commonwealth v. James*, 18 Mass. (1 Pickering) 375 (1823); *Commonwealth v. Eichelberger*, 119 Pa. 254 (1888); *U.S. v. Patton, supra.* But it finally became crystallized to such an extent that, in 1885, the Supreme Court of Illinois could say, with some assurance:

"From this review of the subject it will be perceived there are three classes of cases in which convictions for larceny at common law are sustained where the apparent possession is in the accused: First, where the accused has the mere custody of the property, as contradistinguished from possession, as in the case of servants and the like; second, where he obtains the custody and apparent possession by means of fraud, or with a present purpose to steal the property; and third, where one having acquired possession by a valid contract of bailment, which is subsequently terminated by some tortious act of the bailee, or otherwise, whereby the possession reverts to the owner, leaving the custody, merely, in the former, and the bailee, while being thus a mere custodian, feloniously converts the property to his own use." *Johnson v. People*, 113 Ill. 99.

(a) Cases where the accused has the mere custody of the property as distinguished from possession.

The distinction between custody and possession was discussed in *Crocheran v. State*, 86 Ala. 64 (1888), where a hired hand was held to have committed larceny when he failed to return a mule given him to till the fields:

> "The prosecutor had parted only with the custody of the mule, as distinguished from the possession, which was still in him as owner, although the defendant had custody of the animal as mere employee or servant. It has often been decided, and is now settled law, that goods in the bare charge or custody of a servant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use. Oxford v. State, 33 Ala. 416; 2 Bish. Crim. Law (7th Ed.) Sec. 824.
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> "It is accordingly said by Lord Hale, that it would be larceny if a butler should appropriate his master's plate, of which he had charge; or the shepherd, his master's sheep in his custody; and so, of an apprentice who feloniously embezzles his master's goods. 1 Hale, 506; Roscoe's Crim. Ev. (7th Ed.) 639. In all such cases, the custody of the servant is distinguishable from that of a bailee, or other person who has a special property in the goods, by reason of being under a special contract with respect to them. A mere servant, or employee, has no such special property. 3 Greenl. Ev. (14th Ed.) Sec. 162. Where, however, a bailee, having such special property on good, converts them to his own use, no conviction of larceny can be had, without proving a fraudulent or felonious intention on his part at the time he received the goods in bailment. 2 Whart. Cr. Law (9th Ed.), Sec. 963; Watson v. State, 70 Ala. 13."

In *Robinson v. State*, 1 Cold. (41 Tenn.) 120, 121 (1860), the court said:

> "In 4 Black. Com., Chap. 17, p. 230, text note, the law on this point is laid down, and has, perhaps, never

been departed from. He says there must be a *taking,* which implies the consent of the owner to be wanting. Therefore, no delivery of the owner, to the offender, upon trust, can ground a larceny. As if A lends B a horse, and he rides away with him—or, if I send goods by a carrier, and he carries them away—these are no larcenies. *But if the carrier opens a bale, or package of goods, or pierces a vessel of wine, and takes away a part thereof, these are larcenies,* 'for here the *animus furandi* is manifest.' "

The exception in cases where the bailee "breaks the bulk" will be discussed under (c) below.

In *Fulton v. State,* 13 Ark. 168 (1852), the defendant borrowed a horse to ride to a neighbor's house. He rode there, but instead of returning the horse, went on the next day to Little Rock and sold the horse. The court said there was no larceny unless felonious intent existed at the time of the borrowing. In accord with the *Fulton* case are: *State v. Stone,* 68 Mo. 101 (horse, mare, and wagon borrowed to haul oats to Mt. Vernon and return; after carting oats to Mt. Vernon, defendant kept on going); *State v. Hayes,* 111 N.C. 727 (1892) (ox borrowed to haul lumber); *State v. Wood,* 9 Iowa 116 (1877) (guitar loaned to defendant to repair it); *Grimes v. State,* 68 Ind. 193 (1879) (shotgun loaned to be used on certain trip); *Abrams v. State,* 121 Ga. 170 (1904) (mule loaned to make a trip).

The defendant in *State v. Fann,* 65 N.C. 317 (1871), was a field hand. His employer, while drunk, gave the defendant a roll of money to take care of for him. The court said that as a field hand the defendant had custody of such
17 property as he used in the course of husbandry, but that he was given possession of the money as a friend and bailee, outside the scope of his duties. See also *Case v. State,* 26 Ala. 17 (1885); *Smith v. Commonwealth,* 96 Ky. 85 (1894-5).

Many cases hold that the determining factor in deciding whether possession has been given up is not the scope of the bailee's right to use, or discretion in dealing with, the property, but the presence or absence of a master-servant

relationship.[5] Other cases and text writers, however, state the rule differently; e.g. Wharton's Criminal Law, Vol. II, p. 1508:

> "If a servant or other agent who has merely the care and oversight of the goods of his master—as the butler of plate, a messenger or runner of material or goods, a hostler of horses, the shepherd of sheep, and the like—convert such goods to his own use, without his master's consent, this is a larceny at common law; because the goods at the time they are taken, are deemed in law to be in possession of the master—the possession of the servant in such a case being the possession of the master. The same rule is applicable to all cases in which a person to whom goods are given for a particular purpose (as the agent of another) has bare possession."

Cf. Bishop's Criminal Law, Vol. II, Sec. 835; Miller on Criminal Law, sec. 111 f. Wharton's view is supported by some modern criminal cases and some insurance cases; e.g. *Komito v. State,* 90 Ohio St. 352, 107 N.E. 762 (1914); *Gibson* v. *St. Paul Fire, etc. Co.,* 117 W. Va. 156, 184 S.E. 562; *Jacobson v. Aetna Casualty & Surety Co.,* 233 Minn. 385, 46 N.W.2d 868 (1951).

In *Gibson v. St. Paul Fire, etc. Co., supra,* an action on a theft policy which excluded coverage if the automobile was voluntarily placed by the owner in the possession of another, the court said:

> "* * * temporary care of property does not rise to the dignity of 'possession' within the ordinarily accepted legal meaning of that term. Custody of things means to have them in charge-safekeeping. It implies temporary physical control merely, and does not connote domination, or supremacy of authority, as does

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[5] An exception to this rule is recognized where property is handed over in the owner's presence to be examined and returned, or, in the case of money, to make change; in those situations the owner does not give up possession. *Commonwealth v. O'Malley,* 97 Mass. 584 (1867); *Ellis v. People,* 21 How. Pr. 356; *Hilderbrand v. People,* 3 Thomp. & C. 82, 1 Hun. 19.

possession in its full significance. Possession
18 implies custody coupled with a right or interest of proprietorship. Possession is inclusive of custody, but custody is not tantamount to possession."

In *Jacobson v. Aetna, etc. Co., supra,* the insured, an automobile dealer, let a prospective buyer use a new car over the week end, with the understanding that the deal would be closed on Monday; the prospective buyer, however, did not return the car. The court laid down the following general rules:

> 1. "*Constructive* possession of personal property by its owner exists where the owner has *intentionally* given the *actual* possession—namely, the direct physical control—of the property to another for the purpose of having him do some act *for the owner* to or with the property; that is to say, constructive possession exists wholly in contemplation of law without possession in fact."
>
> 2. "Where the owner retains constructive possession, the party to whom bare physical control of the property has been entrusted for the owner's purpose does not have possession but only custody."

The court found that the owner intended the buyer to exercise exclusive dominion over the car, temporarily or otherwise, solely or primarily for buyer's direct use or purpose, as distinguished from a use or purpose for the direct benefit of the owner.

The case at bar is a criminal case, and a stricter rule of construction must be applied in favor of the defendant than is applied in construing insurance policies which are written by the defendant companies.

The information alleges that Turley obtained the automobile from its owner "to transport certain of their friends to their homes in Columbia, South Carolina, and to return with them". Turley was not a servant of the owner. The use of the automobile was for their joint benefit. Under the weight of authority, Turley had possession of the automobile and not a mere custody.

(b) Cases where custody or possession was obtained by fraud.

Most of the cases under the Dyer Act have dealt with situations where possession was obtained from the owner by fraud; *Hite v. U.S.,* (10 Cir.) 168 F.2d 973; *Murphy v. U.S.,* (5 Cir.) 206 F.2d 571; *Ackerson v. U.S.,* (8 Cir.) 185 F.2d 485; *Ex parte Atkinson,* (E.D.S.C.) 84 F. Supp. 19 300; *U.S. v. O'Carter,* (D.C.S.D.Iowa) 91 F. Supp. 544. These cases, which hold that the Dyer Act requires proof of common law larceny, also hold that the controlling question on that issue is whether the owner intended to give title to the automobile as well as possession. All of them recognize that where possession is obtained by fraud, or through a fraudulent trick or device, the owner retains constructive possession unless he intends to and does part with his title to the property, as well as the possession. See also *U.S. v. Sicurella,* (2 Cir.) 187 F.2d 533, 534; *U.S. v. Patton,* (3 Cir.) 120 F.2d 73, 76; *Loney v. U.S.,* (10 Cir.) 151 F.2d 1, 4; Clark's Criminal Law, p. 322.

No case has been cited or found in which facts similar to those charged in the case at bar have been held not to come within the Dyer Act. On the other hand, *Wilson v. U.S.,* (6 Cir.) 214 F.2d 313, is the only case cited or found in which the Dyer Act was held to apply where possession was obtained in a lawful manner but the defendant converted the vehicle to his own use before transporting it in interstate commerce. And the court in that case, the Sixth Circuit, is the court which has held that proof of common law larceny is not necessary for conviction under the Dyer Act.

The Dyer Act cases are in line with the general law. In *Commonwealth* v. *James,* 18 Mass. (1 Pickering) 375, decided in 1823, the court discussed at length the leading English case, reported in 13 Ed. 4, fol. 9, and said:

> "It will be perceived that here may be found the distinctions which are recognized in the textbooks upon this subject. Thus if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the

delivery were merely colourable, a taking under such circumstances would be felony." 18 Mass. 383, 384.

Tredwell v. U.S., (4 Cir.) 266 Fed. 350, states the rule as follows:

> "Where one comes lawfully into the possession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement; but if, at the time of getting possession lawfully, the one to whom property is intrusted has the intention of appropriating it to his own use, the crime thus committed is the crime of larceny."

The information in the case at bar does not charge that possession was obtained by fraud, or that defendant had any felonious intent at the time he obtained the car.

(c) Cases where the bailment is terminated by some tortious act of the bailee.

The general rule, as set out in Bishop's Criminal Law, Vol. II, sec. 833-835, is that a bailee cannot be guilty of larceny of goods committed to him if he takes them while the relation exists, because he has possession, rather than custody of the goods. But when the relation has ended, as for instance, when the goods conveyed by a carrier have reached their destination, or he has broken open a package in violation of his trust, there may be larceny.

3 Coke's Institutes 107, states:

> "If a bale or pack of merchandise be delivered to one to carry to a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take anything out *animo furandi*, this is larceny. Likewise, if the carrier carry it to the place appointed, and after take the whole pack *animo furandi*, this is larceny also, for the delivery had taken its effect, and the privity of the bailment is determined; and so it is of a tun of wine, or the like, mutatis mutandis."[6]

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[6] To the same effect is *Blackstone*, Book 4, p. *229; *Regina v. William Thristle*, 2 Car. & K. 842 (1848); *Rex v. Banks*, Russ. & Ry. 441 (1821); *Rex v. Smith*, 1 Moody's Crown

In *Tredwell v. U.S.*, (4 Cir.) 266 Fed. 350, the defendant had been employed as a stevedore to unload from vessels nitrate owned by the government, and to load it onto cars for further shipment; after it had been so loaded the defendant caused certain of the cars to be billed to private consumers, to whom he sold the contents. After quoting from *Moore v. U.S.*, 160 U.S. 268, *supra*, Judge Knapp, speaking for the Fourth Circuit said:

21 "Granted that defendant had lawful possession of the nitrate for the purposes of his employment, we think it clear that such possession ceased when the loading of the cars was completed, and that the property then passed into the possession of the railroad company. When he thereupon caused it to be billed to his own customers, instead of the munition plants, his diversion of the property was in substance a felonious taking of it from the railroad company, and this brought his act within the accepted definition of larceny. * * *"

It is larceny when the bailee commits "a tortious act" with respect to the bailment, *Johnson v. People*, 113 Ill. 99, such as breaking bulk; but the "tortious act" does not mean the act of misappropriating the thing bailed itself, else all bailees who misappropriate goods would be guilty of larceny, and the courts have not so held.

In *Rex. v. Charlewood*, cited in East's Cr. L. 689, reported in 1 Leach, Case 189, where the defendant hired a horse for the purpose of going to Barnet, but thereafter converted the horse to his own use, the court charged the jury, inter alia: "There is, however, another point for your consideration; for although he really went to Barnet, yet he was

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Cases 473 (1836); *Rex v. Savage*, 5 Car. & P. 143 (1831); *Rex v. Madox*, Russ. & Ry. 92, (1805); *Rex v. Fletcher, et al.*, 4 Car. & P. 545 (1831); *Rex v. Pratley*, 5 Car. & P. 533 (1833); *Rex v. Brazier, the younger*, Russ & Ry. 337 (1817); *Rex v. Channel*, 2 Strange 793 (1728). The same rule has been applied in a number of American cases: e.g. *Wright v. Lindsdy*, 20 Ala. 428; *Robinson* v. *State*, 41 Tenn. 120. Cf. *Comm. v. Brown*, 4 Mass. 580; *Comm. v. James*, 18 Mass. (1 Pickering) 375; *Comm. v. Eichelberger*, 119 Pa. 254.

obliged by the contract to deliver the gelding to the owner upon his return to London; and therefore, if you think that he performed the journey, and returned to London, and instead of delivering the gelding to the owner converted it, after such return, to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would then be over." 1 Leach 410-411.

In the later case of *Rex v. Banks,* Russ. & Ry. 441, decided in 1821, defendant borrowed a horse under pretense of carrying a child to a neighboring surgeon. The next day he took the horse in a different direction and sold it. The court held that "if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not constitute a new felonious taking, or make him guilty of felony; consequently the conviction could not be supported." See also *Regina v. Jenkins,* 9 Car. & P. 38; *Fulton v. State,* 13 Ark. 168, and the other cases cited above under point (a).

22 The information in the case at bar indicates that the purpose of the bailment had not been completed. The defendant had not brought the friends back to the party before he converted the automobile to his own use. The case, therefore, comes within the general rule that conversion by a bailee in the course of his bailment is not common law larceny.

Since Congress intended the word "stolen" to imply common law larceny, and since the acts charged do not amount to common law larceny, the motion to dismiss the information must be granted.

Roszell C. Thomsen,
U. S. District Judge

23 IN THE UNITED STATES DISTRICT COURT
UNITED STATES OF AMERICA

vs.

JAMES VERNON TURLEY

CRIMINAL NO. 23513

JUDGMENT—May 18, 1956

The above matter having come on for hearing on defendant's motion to dismiss the amended information, and after having read and considered memoranda submitted by the respective parties and having heard argument for counsel on both sides, it is, in accord with the written opinion heretofore filed,

Ordered, Adjudged and Decreed, this 18 day of May, 1956, that the amended information be dismissed for the reasons set out in the opinion.

Roszel C. Thomsen, Chief Judge, United States District Court

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24 IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed June 11, 1956

I. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order entered on May 18, 1956, dismissing the information which charged that defendant violated 18 U.S.C. 2312.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries;
2. Information;

3. Motion to Dismiss;
4. Motion to Amend Information, consent of defendant, Order of Court granting motion;
5. Amended information;
6. Motion to Dismiss Amended Information;
25 7. Opinion of the District Court;
8. Order Dismissing the Information;
9. Notice of Appeal.

III. The following question is presented by this appeal. Whether the word "stolen" as used in 18 U.S.C. 2312 (which prohibits knowing transportation in interstate commerce of stolen motor vehicles) covers only those unlawful takings which amount to common law larceny.

Walter E. Black, Jr., United States Attorney for the District of Maryland

June 11, 1956

Proof of service (omitted in printing).

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26 Clerk's Certificate to foregoing transcript omitted in printing.

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27 SUPREME COURT OF THE UNITED STATES

No. 289 — October Term, 1956

[Title omitted]

Appeal from the United States District Court for the District of Maryland.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

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OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA

v.

JAMES VERNON TURLEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court, as amended by a letter to counsel dated May 31, 1956, has not yet been reported. Copies of the opinion and the amendatory letter are annexed as Appendix A, *infra,* pp. 5-23.

JURISDICTION

The order of the District Court dismissing the amended information for failure to state an offense under 18 U.S.C. 2312, as that statute was construed by the District Court, was entered on May 18, 1956 (App. A, *infra,* p. 24). A notice of appeal to this Court was filed on June 12, 1956. The jurisdiction of this Court

to review on direct appeal an order dismissing an information, based on a construction of the statute on which the information is founded, is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 2312 provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

QUESTION PRESENTED

Whether the word "stolen" as used in 18 U.S.C. 2312 (which prohibits the knowing transportation in interstate commerce of "stolen" motor vehicles) covers only those unlawful takings which amount to common law larceny.

STATEMENT

An amended information filed in the District Court for the District of Maryland charged that the defendant, having in South Carolina lawfully obtained possession of an automobile from the owner for the purpose of driving some friends to their homes, did, without permission of the owner, and with intent in South Carolina to steal the automobile, convert it to his own use, and did unlawfully transport it in interstate commerce from South Carolina to Baltimore, Maryland, where he sold it without permission of the owner.

On the defendant's motion, the District Court dismissed the indictment on the ground that the word "stolen" as used in 18 U.S.C. 2312—the statutory basis for the indictment—covers only common law larceny,

and that the acts charged do not constitute common law larceny (App. A. *infra*, p. 23).

THE QUESTION IS SUBSTANTIAL

The issue in this case—the meaning of the word "stolen" as used in 18 U.S.C. 2312—is one as to which there is a square conflict among the Courts of Appeals. The Ninth Circuit, in its opinion of May 22, 1956, in *Smith* v. *United States* (a copy of which is set forth in Appendix B, *infra*, pp. 25-30) has taken the view, which we believe to be correct, that the word "stolen" as used in the statute embraces all crimes of theft, *i.e.*, all situations where, before the interstate transportation, the defendant has taken the vehicle without right, regardless of whether the wrongful taking would at common law be deemed larceny, embezzlement, or false pretenses. This is in accord with the holdings of the Sixth Circuit in *Davilman* v. *United States*, 180 F. 2d 284, and *Collier* v. *United States*, 190 F. 2d 473, and with the interpretation approved by the Second Circuit in *United States* v. *Sicurella*, 187 F. 2d 533. On the other hand, the Eighth Circuit in *Ackerson* v. *United States*, 185 F. 2d 485, and the Tenth Circuit in *Hite* v. *United States*, 168 F. 2d 973, have held that the word "stolen" covers only those takings which would constitute common law larceny. This conflict concerning a recurring problem is one which should be resolved by this Court.

As the District Court noted in this case, the word "stolen" as used in the statute should be given a uniform meaning throughout the country. We doubt, how-

[1] We do not take issue with the ruling of the District Court that the facts alleged in the indictment do not constitute common law larceny. For that reason the appeal, involving only the construction of the statute, is to this Court.

ever, that this result will be achieved if an attempt is made to read into the statute the technicalities of common law larceny. Rather, we believe, with the Ninth and Sixth Circuits, that the word "stolen" is properly read in its ordinary meaning as covering any unlawful taking, and that such an interpretation will result in uniform application of the law in accordance with the Congressional intent. The legislative history, referred to by the District Court in this case (App. A, *infra*, pp. 7-8) seems to us (as it did to the Ninth Circuit, App. B, *infra*, pp. 28-29) to indicate that Congress did not use the word in any technical sense, but in its normal meaning of any unlawful taking.

CONCLUSION

The construction of 18 U.S.C. 2312 is an important question which should be resolved by this Court.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JULY, 1956.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Criminal No. 23513

UNITED STATES OF AMERICA

v.

JAMES VERNON TURLEY

Filed: May 18, 1956

THOMSEN, Chief Judge

The motion to dismiss the information in this case raises the question whether an automobile is "stolen", within the meaning of Title 18 U.S.C.A. sec. 2312, if the defendant obtained possession from the owner lawfully, but thereafter, and before he drove it across the state line, decided to convert it to his own use. That question has troubled the courts and the enforcement agencies for many years; the amended information in this case was drawn to raise it squarely; and the United States Attorney and court appointed counsel for the defendant have briefed it fully and ably.

The information charges:

> "On or about January 20, 1956, at Columbia, South Carolina, James Vernon Turley did lawfully obtain a certain 1955 Ford automobile from its owner, Charles T. Shaver, with permission of said owner to use the automobile briefly on that day to transport certain of their friends to the homes of the latter in Columbia, South Carolina, and to return with them, but after so obtaining the automobile and transporting said persons to their homes, and before returning with them or deliver-

ing back the automobile to its owner, James Vernon Turley, without permission of the owner, and with intent in South Carolina to steal the 1955 Ford automobile, did convert the same to his own use and did unlawfully transport it in interstate commerce from Columbia, South Carolina, to Baltimore in the State and District of Maryland, knowing it to have been stolen, where he did on January 21, 1956, sell said 1955 Ford automobile without permission of the owner. 18 U.S.C. 2312."

Sec. 3 of the National Motor Vehicle Theft (Dyer) Act, as passed by Congress Oct. 29, 1919, 41 Stat. 324, 325, provided: "That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished * * *". In its present form, as amended in 1945, it provides: "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C.A. sec. 2312.

The problem is: did Congress intend the word "stolen" to mean "taken under circumstances which amount to common law larceny"; if not, what did Congress intend the word "stolen" to mean; if so, do the facts charged amount to common law larceny.

1. Should the word "stolen" be given a uniform meaning throughout the country?

Two circuits have answered this question "yes", and have held that criminal liability under the Dyer Act should not depend upon the meaning given to the word "stolen" by the law of the state where possession of the automobile was obtained or the interstate transportation began. *Hite* v. *U. S.*, (10 Cir.) 168 F.2d 973; *Ackerson* v. *U. S.*, (8 Cir.) 185 F.2d 485. In the absence

of a plain indication to the contrary, the meaning of a statute should not depend on state law. Uniformity is the primary consideration. *Jerome* v. *U. S.*, 318 U. S. 101; *U. S.* v. *Handler*, (2 Cir.) 142 F. 2d 351, 354. When Congress has desired to incorporate state laws into federal statutes, it has done so specifically: e.g. 18 U.S.C.A. secs. 43, 1073, 1262, 5001; 15 U.S.C.A. sec. 715 b.

In most of the opinions which have considered the Dyer Act, it seems to have been assumed that the word "stolen" should have a uniform meaning throughout the country, and should not depend upon the law of the state where the automobile was taken from the owner. In *Hite* v. *U. S.* and *Ackerson* v. *U. S.*, *supra*, the point was expressly decided.

2. Did Congress intend the word "stolen" to mean "taken under circumstances which amount to common law larceny"?

The primary purpose of the Dyer Act was to combat effectively the rising traffic in stolen cares by organized groups of thieves and dealers operating across state lines; this traffic usually involves common law larceny. In the House debate, Mr. Dyer said: "It provides for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." 58 Cong. Rec., Part 6, p. 5472. In the Senate debate, discussing a phrase, subsequently deleted, from sec. 4, "that whoever shall, *with the intent to deprive the owner of the possession thereof*, receive, etc.", Senator Nelson noted that the italicized phrase was surplusage, because one of the elements of the offense of stealing was deprivation of the owner of the thing stolen without his con-

sent, and that this was a "textbook" definition. 58 Cong. Rec., Part 7, p. 6434. Senator Nelson evidently was referring to common law larceny, and not to the hodge-podge of State statutes dealing with the subject.

The Tenth, Eighth and Fifth Circuits have held that the word "stolen", as used in the Dyer Act, requires proof of common law larceny. *Hite* v. *U. S.*, (10 Cir.) 168 F.2d 973; *Ackerson* v. *U. S.*, (8 Cir.) 185 F.2d 485; *Murphy* v. *U. S.*, (5 Cir.) 206 F.2d 571. In *Ex parte Atkinson*, (E.D.S.C.) 84 F. Supp. 300, in our circuit, Judge Wyche came to the same conclusion. See also *U. S.* v. *Bucur*, (7 Cir.) 194 F.2d 297; *U. S.* v. *Kratz*, (D.C.Neb.) 97 F. Supp. 1001; *U. S.* v. *O'Carter*, (D.C. S.D. Iowa) 91 F. Supp. 544.

The only Circuit which has expressly held the contrary is the Sixth Circuit, where a district court decision, *U. S.* v. *Adcock*, 49 F. Supp. 351, has been followed by later cases in the Court of Appeals; *Davilman* v. *U. S.*, 180 F.2d 284; *Collier* v. *U. S.*, 190 F.2d 473; *Wilson* v. *U. S.*, 214 F.2d 313; *Bruce* v. *U. S.*, 218 F.2d 819.

In *U. S.* v. *Sicurella*, (2 Cir.) 187 F.2d 533, the court said:

> "Defendants say that a conviction under the Dyer Act cannot stand unless there is evidence sufficient to prove larceny under the narrowest definition of that crime at common law. Such a contention would not help the defendants even if it were sound—which we do not intend to intimate—for a narrow common law definition is not required under the Dyer Act. See Davilman v. United States, 6 Cir., 180 F.2d 284; Stewart v. United States, 8 Cir., 151 F.2d 386; Looney v. United States, 10 Cir., 151 F.2d 1. Morever, it

was always larceny when there was an intent at the time a bailee acquired possession of the property of another to convert it to his own use and the bailee thereafter did convert it and the owner had given over the property with no intention that title should pass. See e.g., Hite v. United States, 10 Cir., 168 F. 2d 973; United States v. Patton, 3 Cir., 120 F.2d 73; Reg. v. Ashwell, 16 Q.B.D. 190."

It should be noted that *Davilman* is the only case cited by the Second Circuit which holds that the Dyer Act applies to anything except common law larceny. The other cases cited deal with the question whether the facts alleged or proved amounted to larceny, which will be discussed below.

Aside from the Dyer Act, the Federal courts have often held that when a Federal criminal statute uses a term known to the common law and does not define that term, the courts will apply the common law meaning of the term unless the context indicates a contrary intent on the part of Congress.[1]

The constitutional objection to vagueness and uncertainty in criminal statutes is avoided by the rule that an undefined term having a meaning at common law assumes that meaning when used in a statute. *U. S.* v. *Miller*, (W.D.Ky.) 17 F. Supp. 65. See also Crawford, *The Construction of Statutes*, sec. 228: "If a statute is ambiguous or its meaning uncertain, it should

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[1] *U.S.* v. *Brandenburg*, (3 Cir.) 144 F. 2d 656 (burglary); *U.S.* v. *Patton*, (3 Cir.) 120 F. 2d 73 (larceny); *Harrison* v. *U.S.*, 163 U.S. 140 (robbery); *U.S.* v. *Carll*, 105 U.S. 611 (forgery); *U.S.* v. *Smith*, 5 Wheat. 153 (piracy); *U.S.* v. *Palmer*, 3 Wheat. 610 (robbery); *U.S.* v. *Outerbridge*, Fed. Cas. No. 15,978 (murder); *U.S.* v. *Armstrong*, 2 Curt. 451, Fed. Cas. No. 14,467 (manslaughter); *In re Greene*, (C.C. S.D. Ohio) 52 Fed. 104; *U.S.* v. *Cardish*, (D.C.E.D. Wisc.) 143 Fed. 640 (arson); *U.S.* v. *Coppersmith*, (C.C.W.D. Tenn.) 4 Fed. 198 (felony); *U.S.* v. *Clark*, (D. Alaska) 46 Fed. 633; *U.S.* v. *Altmeyer*, (D.C.W.D. Pa.) 113 F. Supp. 854 (extortion).

be construed in connection with the common law in force when the statute was enacted * * * And there is a presumption that the lawmakers did not intend to abrogate or alter it in any manner * * *".

Black's Law Dictionary says "steal", besides being commonly used in indictments for larceny, may denote the criminal taking of personal property either by larceny, embezzlement or false pretenses, and may include the unlawful appropriation of things which are not technically the subject of larceny. This is probably the common, everyday meaning of the word, but the holding of the Tenth, Eighth and Fifth Circuits that the term "steal", when used in a criminal statute and undefined by the text, refers to common law larceny, is supported by the weight of authority in State courts.[2]

When Congress has intended to cover misappropriations other than common law larceny, it has used language appropriate to indicate such intention.[3] In *U. S.*

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[2] See, for example, *State* v. *Frost*, (Mo. Sup.), 289 S.W. 895; *Hughes* v. *Territory*, 8 Okla. 28, 56 P. 708; *Cohoe* v. *State*, 79 Neb. 811, 113 N.W. 532; *Satterfield* v. *Commonwealth*, 105 Va. 867, 52 S.E. 979; *State* v. *Richmond*, 228 Mo. 362, 128 S.W. 744; *Gardener* v. *State*, 55 N.J.L. 17; *State* v. *Fair*, 35 Wash. 127, 76 P. 731.

[3] 18 U.S.C.A. sec. 641: "embezzles, steals, purloins, or knowingly converts * * *" (public money, property or records); 18 U.S.C.A. sec. 642: "secretes within, or embezzles, or takes and carries away * * *" (tools and materials of U.S. for counterfeiting purposes); 18 U.S.C.A. sec. 655: "steals or unlawfully takes, or unlawfully conceals * * *" (theft by bank examiner); 18 U.S.C.A. sec. 656: "embezzles, abstracts, purloins, or wilfully misapplies * * *" (theft by bank employee); 18 U.S.C.A. sec. 657: "embezzles, abstracts, purloins, or willfully misapplies * * *" (theft by employee of credit, etc., company); 18 U.S.C.A. sec. 658: "conceals, removes, disposes of, or converts * * *" (employee of farm credit agency); 18 U.S.C.A. sec. 659 "embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains * * *" (baggage moving in commerce); 18 U.S.C.A. sec. 660: "embezzles, steals, abstracts, or wilfully misapplies * * *" (funds of carrier); 18 U.S.C.A. sec. 663: "embezzling, stealing, or purloining such gift, or converting the

v. *Morgan*, (D.Ark.) 98 F. Supp. 558, the court, construing 18 U.S.C.A. sec. 659, noted that the breadth of the language used in that statute made inapplicable the strict construction of the Dyer Act given in *Hite* v. *U. S.*, (10 Cir.) 168 F.2d 973. Cf. *United States* v. *Stone*, 8 Fed. 232; *United States* v. *Jolly*, 37 Fed. 108; *Crabb* v. *Zerbst*, 99 F.2d 562; *United States* v. *Handler*, 142 F.2d 351; *Morrisette* v. *U. S.*, 342 U. S. 246.

Some states have passed statutes broadening the definition of larceny and wiping out the distinctions between the old common law crimes. But there has been no uniformity in such statutes, and the offense of common law larceny still exists in many of those states.[4]

I conclude that in the Dyer Act and in the current amendment thereto Congress used the term "stolen"

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same * * *" (money solicited for United States); 18 U.S.C.A. sec. 1704: "steals, purloins, embezzles, or obtains by false pretenses * * *" (keys or locks—mail containers); 18 U.S.C.A. sec. 1707: "steals, purloins, or embezzles * * * or appropriates * * * to * * * any other than its proper use * * *" (post office property) 18 U.S.C.A. sec. 1708: "steals, takes, or abstracts, or by fraud or deception obtains * * *" (mail matter); 18 U.S.C.A. sec. 2314: "knowing the same to have been stolen, converted or taken by fraud * * *" (transportation of articles used in counterfeiting); 18 U.S.C.A. sec. 2315: "knowing the same to have been stolen, unlawfully converted, or taken * * *" (sale or receipt of such articles).

[4] In South Carolina, where the transactions in the case at bar took place, the court has held that "when the possession of property has been legally obtained, and thereafter fraudulently converted to his own use by the person having the possession, an indictment at common law will not lie, because larceny at common law, is an offense against the possession of property." *State* v. *Posey*, 70 S.E. 612, 88 S.C. 313 (1911). Like some other states South Carolina has passed a statute, S.C. Code Ann. 16-365, which provides: "Breach of trust with fraudulent intent. Any person committing a breach of trust with a fraudulent intention shall be held guilty of larceny, and so shall any person who shall hire or counsel any other person to commit a breach of trust with a fraudulent intention."

Under the South Carolina statute therefore, Turley would have been guilty of larceny, but he would not have been guilty of common law larceny, as that term has been understood in South Carolina.

to imply a taking which amounts to common law larceny, not "under the narrowest definition of that crime at common law", but as "common law larceny" has been understood in the United States.

3. Do the facts alleged amount to common law larceny?

U.S. v. *Patton,* (3 Cir.) 120 F.2d 73, discusses some general principles:

> " 'Larceny, at common law, is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein.' Clark's Cr. Law (3rd Ed.) 305. One of the essential elements of the crime is that the taking is by trespass, that is, without the consent of the owner. So in Reg. v. Ashwell, 16 Q.B.D. 190, A. L. Smith, J., said (p. 195): 'To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law.' " (120 F.2d at 75)

In *Moore* v. *U.S.,* 160 U.S. 268, the Supreme Court said:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been in-

trusted, or into whose hands it has lawfully come, and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking."

The common law with respect to larceny by servants, agents and bailees went through a long period of development. See discussions in *Commonwealth* v. *Ryan*, 155 Mass. 523 (1892); *Commonwealth* v. *James*, 18 Mass. (1 Pickering) 375 (1823); *Commonwealth* v. *Eichelberger*, 119 Pa. 254 (1888); *U.S.* v. *Patton*, *supra*. But it finally became crystallized to such an extent that, in 1885, the Supreme Court of Illinois could say, with some assurance:

"From this review of the subject it will be perceived there are three classes of cases in which convictions for larceny at common law are sustained where the apparent possession is in the accused; First, where the accused has the mere custody of the property, as contradistinguished from possession, as in the case of servants and the like; second, where he obtains the custody and apparent possession by means of fraud, or with a present purpose to steal the property; and third, where one having acquired possession by a valid contract of bailment, which is subsequently terminated by some tortious act of the bailee, or otherwise, whereby the possession reverts to the owner, leaving the custody, merely, in the former, and the bailee, while being thus a mere custodian, feloniously converts the property to his own use." *Johnson* v. *People*, 113 Ill. 99.

(a) Cases where the accused has the mere custody of the property as distinguished from possession.

The distinction between custody and possession was discussed in *Crocheran* v. *State*, 86 Ala. 64 (1888), where a hired hand was held to have committed larceny when he failed to return a mule given him to till the fields:

> "The prosecutor had parted only with the custody of the mule, as distinguished from the possession, which was still in him as owner, although the defendant had custody of the animal as mere employee or servant. It has often been decided, and is now settled law, that goods in the bare charge or custody of a servant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use.—Oxford v. State, 33 Ala. 416; 2 Bish. Crim. Law (7th Ed.) Sec. 824.
>
> "It is accordingly said by Lord Hale, that it would be larceny if a butler should appropriate his master's plate, of which he had charge; or the shepherd, his master's sheep in his custody; and so, of an apprentice who feloniously embezzles his master's goods.—1 Hale, 506; Roscoe's Crim. Ev. (7th Ed.) 639. In all such cases, the custody of the servant is distinguishable from that of a bailee, or other person who has a special property in the goods, by reason of being under a special contract with respect to them. A mere servant, or employee, has no such special property. 3 Greenl. Ev. (14th Ed.) Sec. 162. Where, however, a bailee, having such special property on goods, converts them to his own use, no conviction of larceny can be had, without proving a fraudulent or felonious intention on his part at the time he received the

goods in bailment. 2 Whart. Cr. Law (9th Ed.), Sec. 963; Watson v. State, 70 Ala. 13."

In *Robinson* v. *State*, 1 Cold. (41 Tenn.) 120, 121 (1860), the court said:

> "In 4 Black. Com., Chap. 17, p. 230, texts note, the law on this point is laid down, and has, perhaps, never been departed from. He says there must be a *taking*, which implies the consent of the owner to be wanting. Therefore, no delivery of the owner, to the offender, upon trust, can ground a larceny. As if A lends B a horse, and he rides away with him—or, if I send goods by a carrier, and he carries them away—these are no larcenies. *But if the carrier opens a bale, or package of goods, or pierces a vessel of wine, and takes away a part thereof, these are larcenies, 'for here the animus furandi is manifest.'*"

The exception in cases where the bailee "breaks the bulk" will be discussed under (c) below.

In *Fulton* v. *State*, 13 Ark. 168 (1852), the defendant borrowed a horse to ride to a neighbor's house. He rode there, but instead of returning the horse, went on the next day to Little Rock and sold the horse. The court said there was no larceny unless felonious intent existed at the time of the borrowing. In accord with the *Fulton* case are: *State* v. *Stone*, 68 Mo. 101 (horse, mare, and wagon borrowed to haul oats to Mt. Vernon, and return; after carting oats to Mt. Vernon, defendant kept on going); *State* v. *Hayes*, 111 N.C. 727 (1892) (ox borrowed to haul lumber); *State* v. *Wood*, 9 Iowa 116, (1877) (guitar loaned to defendant to repair it); *Grimes* v. *State*, 68 Ind. 193 (1879) (shotgun loaned to be used on certain trip); *Abrams* v. *State*, 121 Ga. 170 (1904) (mule loaned to make a trip).

The defendant in *State* v. *Fann*, 65 N.C. 317 (1871), was a field hand. His employer, while drunk, gave the defendant a roll of money to take care of for him. The court said that as a field hand the defendant had custody of such property as he used in the course of husbandry, but that he was given possession of the money as a friend and bailee, outside the scope of his duties. See also *Case* v. *State*, 26 Ala. 17 (1885); *Smith* v. *Commonwealth*, 96 Ky. 85 (1894-5).

Many cases hold that the determining factor in deciding whether possession has been given up is not the scope of the bailee's right to use, or discretion in dealing with, the property, but the presence or absence of a master-servant relationship.[5] Other cases and text writers, however, state the rule differently; e.g., Wharton's Criminal Law, Vol. II, p. 1508:

> "If a servant or other agent who has merely the care and oversight of the goods of his master—as the butler of plate, a messenger or runner of material or goods, a hostler of horse, the shepherd of sheep, and the like—convert such goods to his own use, without his master's consent, this is a larceny at common law; because the goods at the time they are taken, are deemed in law to be in possession of the master—the possession of the servant in such a case being the possession of the master. The same rule is applicable to all cases in which a person to whom goods are given for a particular purpose (as the agent of another) has bare possession."

[5] An exception to this rule is recognized where property is handed over in the owner's presence to be examined and returned, or, in the case of money, to make change; in those situations the owner does not give up possession. *Commonwealth* v. *O'Malley*, 97 Mass. 584 (1867); *Ellis* v. *People*, 21 How. Pr. 356; *Hilderbrand* v. *People*, 3 Thomp. & C. 82, 1 Hun. 19.

Cf. Bishop's Criminal Law, Vol. II, Sec. 835; Miller on Criminal Law, sec. 111 f. Wharton's view is supported by some modern criminal cases and some insurance cases; e.g. *Komito* v. *State*, 90 Ohio St. 352, 107 N.E. 762 (1914); *Gibson* v. *St. Paul Fire, etc. Co.*, 117 W. Va. 156, 184 S.E. 562; *Jacobson* v. *Aetna Casualty & Surety Co.*, 233 Minn. 385, 46 N.W.2d 868 (1951).

In *Gibson* v. *St. Paul Fire, etc. Co., supra*, an action on a theft policy which excluded coverage if the automobile was voluntarily placed by the owner in the possession of another, the court said.

> "* * * temporary care of property does not rise to the dignity of 'possession' within the ordinarily accepted legal meaning of that term. Custody of things means to have them in charge-safe-keeping. It implies temporary physical control merely, and does not connote domination, or supremacy of authority, as does possession in its full significance. Possession implies custody coupled with a right or interest of proprietorship. Possession is inclusive of custody, but custody is not tantamount to possession."

In *Jacobson* v. *Aetna, etc. Co., supra*, the insured, an automobile dealer, let a prospective buyer use a new car over the week end, with the understanding that the deal would be closed on Monday; the prospective buyer, however, did not return the car. The court laid down the following general rules:

> 1. "*Constructive* possession of personal property by its owner exists where the owner has *intentionally* given the *actual* possession—namely, the direct physical control—of the property to another for the purpose of having him do some act *for the owner* to or with the property; that is to say, con-

structive possession exists wholly in contemplation of law without possession in fact."

2. "Where the owner retains constructive possession, the party to whom bare physical control of the property has been entrusted for the owner's purpose does not have possession but only custody."

The court found that the owner intended the buyer to exercise exclusive dominion over the car, temporarily or otherwise, solely or primarily for buyer's direct use or purpose, as distinguished from a use or purpose for the direct benefit of the owner.

The case at bar is a criminal case, and a stricter rule of construction must be applied in favor of the defendant than is applied in construing insurance policies which are written by the defendant companies.

The information alleges that Turley obtained the automobile from its owner "to transport certain of their friends to their homes in Columbia, South Carolina, and to return with them". Turley was not a servant of the owner. The use of the automobile was for their joint benefit. Under the weight of authority, Turley had possession of the automobile and not a mere custody.

(b) Cases where custody or possession was obtained by fraud.

Most of the cases under the Dyer Act have dealt with situations where possession was obtained from the owner by fraud; *Hite* v. *U. S.*, (10 Cir.) 168 F.2d 973; *Murphy* v. *U. S.*, (5 Cir.) 206 F.2d 571; *Ackerson* v. *U. S.*, (8 Cir.) 185 F.2d 485; *Ex parte Atkinson*, (E.D. S.C.) 84 F. Supp. 300; *U. S.* v. *O'Carter*, (D.C.S.D. Iowa) 91 F. Supp. 544. These cases, which hold that the Dyer Act requires proof of common law larceny,

also hold that the controlling question on that issue is whether the owner intended to give title to the automobile as well as possession. All of them recognize that where possession is obtained by fraud, or through a fraudulent trick or device, the owner retains constructive possession unless he intends to and does part with his title to the property, as well as the possession. See also *U. S.* v. *Sicurella*, (2 Cir.) 187 F.2d 533, 534; *U. S.* v. *Patton*, (3 Cir.) 120 F.2d 73, 76; *Loney* v. *U. S.*, (10 Cir.) 151 F.2d 1, 4; Clark's Criminal Law, p. 322.

No case has been cited or found in which facts similar to those charged in the case at bar have been held not to come within the Dyer Act. On the other hand, *Wilson* v. *U. S.*, (6 Cir.) 214 F.2d 313, is the only case cited or found in which the Dyer Act was held to apply where possession was obtained in a lawful manner but the defendant converted the vehicle to his own use before transporting it in interstate commerce. And the court in that case, the Sixth Circuit, is the court which has held that proof of common law larceny is not necessary for conviction under the Dyer Act.

The Dyer Act cases are in line with the general law. In *Commonwealth* v. *James*, 18 Mass (1 Pickering) 375, decided in 1823, the court discussed at length the leading English case, reported in 13 Ed. 4, fol. 9, and said:

> "It will be perceived that here may be found the distinctions which are recognized in the textbooks upon this subject. Thus if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the delivery were merely colourable, a taking under such circumstances would be felony." 18 Mass. 383, 384.

Tredwell v. *U. S.*, (4 Cir.) 266 Fed. 350, states the rule as follows:

> "Where one comes lawfully into the possession of property, and afterwards and while it is in his possession forms and carries out the purpose of appropriating it to his own use, the crime thus committed is the crime of embezzlement; but if, at the time of getting possession lawfully, the one to whom property is intrusted has the intention of appropriating it to his own use, the crime thus committed is the crime of larceny."

The information in the case at bar does not charge that possession was obtained by fraud, or that defendant had any felonious intent at the time he obtained the car.

(c) Cases where the bailment is terminated by some tortious act of the bailee.

The general rule, as set out in Bishop's Criminal Law, Vol. II, sec. 833-835, is that a bailee cannot be guilty of larceny of goods committed to him if he takes them while the relation exists, because he has possession, rather than custody of the goods. But when the relation has ended, as for instance, when the goods conveyed by a carrier have reached their destination, or he has broken open a package in violation of his trust, there may be larceny.

3 Coke's Institutes 107, states:

> "If a bale or pack of merchandise be delivered to one to carry to a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take anything out *animo furandi*, this is larceny. Likewise, if the carrier carry it to the place appointed, and after take the whole pack *animo furandi*, this is larceny also, for the

> delivery had taken its effect, and the privity of the bailment is determined; and so it is of a tun of wine, or the like, mutatis mutandis."[6]

In *Tredwell* v. *U. S.*, (4 Cir.) 266 Fed. 350, the defendant had been employed as a stevedore to unload from vessels nitrate owned by the government, and to load it onto cars for further shipment; after it had been so loaded the defendant caused certain of the cars to be billed to private consumers, to whom he sold the contents. After quoting from *Moore* v. *U. S.*, 160 U. S. 268, *supra*, Judge Knapp, speaking for the Fourth Circuit said:

> "Granted that defendant had lawful possession of the nitrate for the purposes of his employment, we think it clear that such possession ceased when the loading of the cars was completed, and that the property then passed into the possession of the railroad company. When he thereupon caused it to be billed to his own customers, instead of the munition plants, his diversion of the property was in substance a felonious taking of it from the railroad company, and this brought his act within the accepted definition of larceny. * * *"

It is larceny when the bailee commits "a tortious act" with respect to the bailment, *Johnson* v. *People*,

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[6] To the same effect is *Blackstone*, Book 4, p. 229; *Regina* v. *William Thristle*, 2 Car. & K. 842 (1848); *Rex* v. *Banks*, Russ. & Ry. 441 (1821); *Rex* v. *Smith*, 1 Moody's Crown Cases 473 (1836); *Rex* v. *Savage*, 5 Car & P. 143 (1831); *Rex* v. *Madox*, Russ. & Ry. 92, (1805); *Rex* v. *Fletcher, et al.*, 4 Car. & P. 545 (1831); *Rex* v. *Pratley*, 5 Car. & P. 533 (1833); *Rex* v. *Brazier, the younger*, Russ. & Ry. 337 (1817); *Rex* v. *Channel*, 2 Strange 793 (1728). The same rule has been applied in a number of American cases: e.g. *Wright* v. *Lindsay*, 20 Ala. 428; *Robinson* v. *State*, 41 Tenn. 120. Cf. *Comm.* v. *Brown*, 4 Mass. 580; *Comm.* v. *James*, 18 Mass. (1 Pickering) 375; *Comm.* v. *Eichelberger*, 119 Pa. 254.

113 Ill. 99, such as breaking bulk; but the "tortious act" does not mean the act of misappropriating the thing bailed itself, else all bailees who misappropriate goods would be guilty of larceny, and the courts have not so held.

In *Rex* v. *Charlewood,* cited in East's Cr. L. 689, reported in 1 Leach, Case 189, where the defendant hired a horse for the purpose of going to Barnet, but thereafter converted the horse to his own use, the court charged the jury, inter alia: "There is, however, another point for your consideration; for although he really went to Barnet, yet he was obliged by the contract to deliver the gelding to the owner upon his return to London; and therefore, if you think that he performed the journey, and returned to London, and instead of delivering the gelding to the owner converted it, after such return, to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would then be over." 1 Leach 410-411.

In the later case of *Rex* v. *Banks,* Russ. & Ry. 441, decided in 1821, defendant borrowed a horse under pretense of carrying a child to a neighboring surgeon. The next day he took the horse in a different direction and sold it. The court held that "if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not constitute a new felonious taking, or make him guilty of felony; consequently the conviction could not be supported." See also *Regina* v. *Jenkins,* 9 Car. & P. 38; *Fulton* v. *State,* 13 Ark. 168, and the other cases cited above under point (a).

The information in the case at bar indicates that the purpose of the bailment had not been completed. The defendant had not brought the friends back to the party before he converted the automobile to his own use. The case, therefore, comes within the general rule

that conversion by a bailee in the course of his bailment is not common law larceny.

Since Congress intended the word "stolen" to imply common law larceny, and since the acts charged do not amount to common law larceny, the motion to dismiss the information must be granted.

(Sgd.) ROSZEL C. THOMSEN,
U. S. District Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Roszel C. Thomsen
Chief Judge

May 31, 1956

William F. Mosner, Esq.
Assistant U. S. Attorney
Post Office Building
Baltimore 2, Maryland

Fenton L. Martin, Esq.
1604 First National Bank Building
Baltimore 2, Maryland

Re: U.S.A. v. Turley—Criminal No. 23513

Gentlemen:

In lines 14 and 15 on page 2 of the typewritten copy of the opinion in the above entitled case, I have deleted three words: "common" and "and statutes". Lines 14 and 15 now read as follows: "upon the meaning given to the word "stolen" by the law of the state where possession of the automobile was obtained". [*supra*, p. 6]

Very truly yours,
(S.) ROSZEL C. THOMSEN,
Chief Judge.

LEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 23513

UNITED STATES OF AMERICA

vs.

JAMES VERNON TURLEY

ORDER

The above matter having come on for hearing on defendant's motion to dismiss the amended information, and after having read and considered memoranda submitted by the respective parties and having heard argument for counsel on both sides, it is, in accord with the written opinion heretofore filed,

ORDERED, ADJUDGED AND DECREED, this 18th day of May, 1956, that the amended information be dismissed for the reasons set out in the opinion.

(S.) ROSZEL C. THOMSEN,
Chief Judge,
United States District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,904 May 22, 1956

WILLIE RAY SMITH, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Northern Division

Before: DENMAN, Chief Judge and ORR and LEMMON, Circuit Judges.

DENMAN, Chief Judge:

Smith appeals from his conviction of violating 18 U.S.C. § 2312 which prohibits transporting a motor vehicle in interstate commerce knowing it to have been stolen.[1] He argues that the term "stolen" means no more than common law larceny,[2] and that the evidence is not sufficient to support a verdict of guilty based on such a construction of Section 2312.

One Riggs purchased a 1949 Ford under a conditional sales contract which gave him possession and put title in the Home Finance Co. of Phoenix, Arizona. Riggs owned two other automobiles and planned to move from Arizona to Oklahoma. Appellant Smith agreed to drive

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[1] Section 2312 provides: "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806."

[2] This court expressly reserved decision on the construction of the term "stolen" in Section 2312 in United States v. Bremer, 207 F. 2d 247 (Cir. 9, 1953). See also, United States v. Kratz, 97 F. Supp. 999 (D. Neb., 1951).

the 1949 Ford on the trip and did so. After arriving in Oklahoma, Riggs decided he could not keep up the payments on the 1949 Ford. Riggs gave Smith his permission to drive the 1949 Ford back to Phoenix where Smith was to contact the Home Finance Co. immediately and either turn over the car or assume the payments himself.

Smith drove the car to Phoenix, but he failed to contact the Home Finance Co. at any time or make any payment under the contract. Shortly after his return to Phoenix he drove from Arizona to Alabama, then to Missouri, Indiana and Michigan and returned to Phoenix via Indiana and Missouri. During the trip to the South and the Midwest Smith removed the car's Arizona license plates and replaced them with ones from Missouri. He then proceeded from Arizona to California where he was arrested and charged with interstate transportation of a motor vehicle knowing it to have been stolen.

The United States argues that we need not reach the question of whether Section 2312 is applicable to situations of embezzlement or is confined to cases of larceny. It contends that there was sufficient evidence from which the jury could have found that Smith intended to convert the car at the time he took possession of it from Riggs. Such a taking from a bailee would constitute larceny.

However, the jury was instructed that it could find Smith guilty if he had the intent to permanently deprive the owner of possession when he took possession of the car or if that intent were formed at some later time. Even though the evidence might be sufficient to support a conviction under the larceny instruction, we cannot tell whether the jury actually did convict on this theory. If it concluded that Smith's intent to steal the car was formed *after he took possession,* and if em-

bezzlement is not included within Section 2312, there was insufficient evidence on which to base his conviction. Therefore, the question of the meaning of the term "stolen" in Section 2312 must be determined. Cf. Stein v. New York, 346 U.S. 156 (1953).

The circuits are divided over the scope of the term "stolen" in Section 2312. Smith urges this court to side with those circuits which equate "stolen" with common law larceny and refuse to extend it to cover other theft crimes.[3] This would require the Government to prove he intended to convert the Ford to his own use *at the time he took possession of it* from Riggs,[4] a difficult task in this case. On the other hand, the Government naturally asserts that the cases broadly construing "stolen" to include all the theft crimes are better reasoned.[5] Under such a view the Government

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[3] See Murphy v. United States, 206 F.2d 571 (Cir. 5, 1953); Ackerson v. United States, 185 F.2d 485 (Cir. 8, 1950); Hite v. United States, 168 F.2d 973 (Cir. 10, 1953); United States v. O'Carter, 91 F. Supp. 544 (S.D. Iowa, 1949); Ex parte Atkinson, 84 F. Supp. 300 (E.D. S.D., 1949). Cf. Hand v. United States, 227 F.2d 794 (Cir. 8, 1955); Stewart v. United States, 151 F.2d 386 (Cir. 8, 1955).

These cases all involve a situation where the owner of the automobile intended to pass title as well as possession but was given a worthless check or a stolen car in trade, a false pretenses crime rather than larceny. However, the reasoning would cover a case where one received lawful possession and later decided to convert the car to his own use, an embezzlement situation.

[4] United States v. Sicurella, 187 F.2d 533 (Cir. 2, 1951). See Hall and Glueck, Criminal Law and Enforcement 165-171 (1951) on the development of the law of theft.

[5] See Breece v. United States, 218 F.2d 819 (Cir. 6, 1954); Wilson v. United States, 214 F.2d 313 (Cir. 6, 1954); Collier v. United States, 190 F.2d 473 (Cir. 6, 1951); Davilman v. United States, 180 F.2d 284 (Cir. 6, 1950); United States v. Adcock, 49 F.Supp. 351 (W.D. Ky., 1943). Dictum, United States v. Sicurella, 187 F. 2d 533 (Cir. 2, 1951).

These cases all involve an embezzlement situation, but their reasoning would appear to encompass fraudulent pretenses as well. But see, Collier v. United States, supra.

could sustain its conviction if the evidence supported a verdict that Smith, although he took the car with honest motives formed an intention to convert it to his own use at any time *after he lawfully received possession.* Such a change of plan by a bailee would be embezzlement.[6]

Those cases which limit the application of Section 2312 to larceny siutations do so on the ground that "stolen" in a technical sense means larceny, the taking of a car without the owner's consent with an intent to deprive him of possession permanently. Since criminal statutes are to be strictly construed against the imposition of criminality, Section 2302 may not encompass the other crimes relating to obtaining or converting personal property.

However, "stolen" in a more general usage includes larceny, larceny by trick, fraudulent pretenses and embezzlement since it means:

> "taking the personal property of another for one's own use without right or law, and . . . such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it."[8]

If it was the purpose of Congress to use the word "stolen" in this more common sense, that plan should not be frustrated by the rule of strict construction against criminality. In 1919 when this statute was

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[6] 29 C.J.S. Embezzlement §§ 4, 5.

[7] Webster's New International Dictionary 2465.

[8] United States v. Adcock, 49 F.Supp. 351 (W.D. Ky., 1943). All of the cases in footnote 5 supra, adopting the broader view of the definition of "stolen" in Section 2312 follow the Adcock case. Black's Law Dictionary also takes the view that "to steal" encompasses all theft crimes.

passed Congress was concerned with large scale organized automobile theft and the problem of state power ending at the state line.[9] As the Supreme Court observed in a decision upholding the constitutionality of the act,

> "The quick passage of the machines into another state helps conceal trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price."[10]

Automobile thieves may obtain cars in many ways. Typically an unattended car is taken.[11] However, a thief may give a dealer a worthless check for a certificate of title.[12] A trusted employee of an automobile dealer may have lawful possession of the stock of cars and later take them into another state and wrongfully sell them.[13] These are larceny, false pretenses and embezzlement situations, but the evil is the same. The owner of the car is deprived of it, and state law is ineffective to protect him.

Congress would have no reason to differentiate among the various theft crimes in view of its purposes in enacting Section 2312. The courts should not graft such a distinction on the statute.

Construing "stolen" in Section 2312 to include embezzlement, there is little question that there was sufficient evidence of Smith's intent to convert the car

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[9] See H.R. Rep. No. 312, 66th Cong., 1st Sess. 1, 4, (1919); 58 Cong. Rec. 5470-5478, 6433-6435 (1919).

[10] Brooks v. United States, 267 U.S. 432 (1925).

[11] It must be conceded that this was the situation which particularly concerned Congress in the debates on the bill, but nothing in those debates is inconsistent with a purpose to include all the theft crimes. See 58 Cong. Rec. 5470-5478, 6433-6435 (1919).

[12] See cases cited in Note 3, supra.

[13] See United States v. Bucur, 194 F.2d 297 (Cir. 7, 1952).

to his own use formed after he obtained possession, to justify sending the case to the jury and to support its verdict of guilty.[14] Smith failed to contact the Home Finance Co. either time he was in Phoenix, he failed to make any payments, he drove the car on an extensive trip without the permission of its legal owner, he changed its license plates and he intimated to his half-brother that the car was stolen. The jury was free to disbelieve his testimony that he had come to California to earn money to make payments on the car.

The judgment is affirmed.

(Endorsed:) Opinion. Filed May 22, 1956.
Paul P. O'Brien, Clerk.

[14] See Elwert v. United States, 9th Circuit, No. 14846, March 22, 1956, and cases cited in Note 5 of that opinion as to the function of this court in reviewing questions of the sufficiency of circumstantial evidence.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956 391877

No. 230

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES VERNON TURLEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES

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WARREN OLNEY III,
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> * * * In the House debate, Mr. Dyer said: "It provides for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another state for the purpose of selling and disposing of it." 58 Cong. Rec., Part 6, p. 5472. In the Senate debate, discussing a phrase, subsequently deleted, from sec. 4, "that whoever shall, *with the intent to deprive the owner of the possession thereof,* receive, etc.", Senator Nelson noted that the italicized phrase was surplusage, because one of the elements of the offense of stealing was deprivation of the owner of the thing stolen without his consent, and that this was a "textbook" definition. 58 Cong. Rec., Part 7, p. 6434. Senator Nelson evidently was referring to common-law larceny. * * * [Italics in opinion.]

Contrary to the court's suggestion, Mr. Dyer's remarks quoted above seem to us indicative of the broad purpose and scope of the Act. They in no way import that "stolen" was equated solely with "larceny." Nor can we agree with the District Court's conclusion that Senator Nelson's statement had reference to common-law larceny.[6] The full statement is as follows (58 Cong. Rec. 6434):

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[6] The phrase objected to by Senator Nelson was in Section 4 of the Act (now 18 U. S. C. 2313), punishing the receipt of the stolen car for the purpose of selling it, after it had been stolen and transported in interstate commerce. The debate on this issue (58 Cong. Rec. 6434) shows that the phrase had been originally inserted in Section 4 to prevent the receiver from being prosecuted if he received the car for the purpose of hold-

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ment of any kind of conversion, regardless of whether it is larceny, embezzlement, or false pretenses; if there is consent, there is no conversion. There is nothing in Senator Nelson's statement, or in any of the legislative history of the Act, to suggest that the owner's consent (as in the case of common-law larceny) must be lacking *at the time the thief initially takes possession of the car.* So long as the car has previously been wrongly converted to the thief's own use—regardless of whether the conversion is subsequent to the acquisition of possession—the car is "stolen" for purposes of the Dyer Act.

The conflicting views among the courts of appeals on this issue developed, for the most part, after the decision of the Tenth Circuit in *Hite* v. *United States*, 168 F. 2d 973, decided June 30, 1948, just after enactment of the 1948 revision of the Criminal Code (Act of June 25, 1948, ch. 645, 62 Stat. 683).[7] Thereafter the Department of Justice recommended, often in connection with other suggested changes,[8] that the meaning of the term be clarified by legislation, and, because of the possibility of legislation, did not seek review by this Court. Although the recommended

[7] See *Murphy* v. *United States*, 206 F. 2d 571 (C. A. 5, 1953); *Ackerson* v. *United States*, 185 F. 2d 485 (C. A. 8, 1950). But see, *e. g.*, *Carpenter* v. *United States*, 113 F. 2d 692 (1940), and *Abraham* v. *United States*, 15 F. 2d 911 (1926), both from the Eighth Circuit, which interpreted the word "stolen" in accordance with the state definitions of larceny. The *Abraham* case arose in Oklahoma, where larceny is defined by statute in the narrow common-law sense. The *Carpenter* case arose in Minnesota, where the definition of larceny includes embezzlement and other types of fraudulent taking.

[8] See, *e. g.*, H. R. 3379, S. 1384, 80th Cong., 1st Sess.; H. R. 2948 (relating solely to amendment to include "trailer, semi-

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 289

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES VERNON TURLEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court dismissing the information (R. 5–20) is reported at 141 F. Supp. 527.

JURISDICTION

The order of the District Court dismissing the information for failure to state an offense under 18 U. S. C. 2312, as that statute was construed by the District Court, was entered on May 18, 1956 (R. 21). A notice of appeal to this Court was filed on June 11, 1956 (R. 21), and this Court noted probable jurisdiction of the appeal on October 8, 1956 (R. 22). 352 U. S. 816. The jurisdiction of this Court to review on direct appeal an order dismissing an information, based on a construction of the statute on which the

information is founded, is conferred by 18 U. S. C. 3731.

QUESTION PRESENTED

Whether the word "stolen" as used in 18 U. S. C. 2312 (which prohibits the knowing transportation in interstate commerce of "stolen" motor vehicles) refers only to those unlawful takings which amount to common-law larceny.

STATUTE INVOLVED

18 U. S. C. 2312, which is Section 3 of the National Motor Vehicle Theft (Dyer) Act, 62 Stat. 806, provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On April 19, 1956, a single-count information under 18 U. S. C. 2312 (*supra*) was filed against the appellee in the District Court for the District of Maryland. The information charged that the appellee, having in South Carolina lawfully obtained possession of an automobile from the owner for the purpose of driving some friends to their homes, did, without permission of the owner, and with intent in South Carolina to steal the automobile, convert it to his own use, and did unlawfully transport it in interstate commerce from South Carolina to Baltimore, Maryland, where he sold it without permission of the owner (R. 4).

On the appellee's motion (R. 4–5), the District Court dismissed the information on the ground that the word "stolen" as used in 18 U. S. C. 2312 refers only to those unlawful takings which amount to common-law larceny, and that the acts charged do not constitute common-law larceny (R. 20).[1]

SUMMARY OF ARGUMENT

When Congress passed the National Motor Vehicle Theft Act (commonly known as the Dyer Act), it did not define the meaning of the word "stolen" as used therein. The Government contends that the term encompasses all situations where a vehicle is appropriated without right and then transported in interstate commerce, regardless of whether at common law the theft would be deemed larceny, embezzlement, or false pretenses. The Court of Appeals for the Second, Fourth, Sixth, and Ninth Circuits have approved of this construction. The Fifth, Eighth, and Tenth Circuits, however, have equated "stolen" with larceny and have then proceeded to the common law to obtain a definition of larceny, with the result that in those circuits the statute is restricted to the scope of common-law larceny.

A. "Stolen" is not coterminous with larceny. "Stealing" was not a technical term of the common-law and thus has no common-law definition to restrict its meaning. In ordinary usage, the word denotes any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives

[1] We do not take issue with the ruling of the District Court that the facts alleged in the information do not constitute common-law larceny.

the owner of the rights and benefits of ownership. This being the case, "stolen" as used in the Dyer Act should be read in the same manner. There is no basis for importing into the statute the technical limitations of common-law larceny simply because larceny is one of the offenses included within the scope of the term "stealing".

B. Moreover, the legislative history of the Dyer Act supports the conclusion that Congress used the comprehensive, non-technical word "stolen" in its ordinary sense. Congress, far from using "stolen" as coterminous with common-law larceny, appears to have used the term as synonymous with "theft." And common-law larceny is, of course, only one type of "theft." Even more significant is the evil which Congress sought to remedy through the Act. Congress was concerned, not with common-law distinctions as to how the thief acquired possession of the "stolen" automobile, but rather with the broad, general purpose of suppressing crime in interstate commerce. Whether the theft was accomplished by larceny, embezzlement, or false pretenses, the evil remained the same. The owner of the car was deprived of it, and state law was ineffective to protect him.

ARGUMENT

THE TERM "STOLEN," AS USED IN THE DYER ACT, ENCOMPASSES ALL CRIMES OF THEFT AND NOT ONLY THOSE UNLAWFUL TAKINGS WHICH AMOUNT TO COMMON-LAW LARCENY

It is the Government's contention that the word "stolen" is used in 18 U. S. C. 2312, the Dyer Act, to embrace all situations where a vehicle was appropri-

ated without right and then transported in interstate commerce, regardless of whether at common law the theft would be deemed larceny, embezzlement, or false pretenses. This construction of the statute is in accord with holdings of the Fourth, Sixth, and Ninth Circuits and is approved by the Second Circuit. *Boone* v. *United States*, 235 F. 2d 939 (C. A. 4) (false pretenses); *Breece* v. *United States*, 218 F. 2d 819 (C. A. 6) (embezzlement); *Wilson* v. *United States*, 214 F. 2d 313 (C. A. 6) (embezzlement); *Collier* v. *United States*, 190 F. 2d 473 (C. A. 6) (embezzlement); *Davilman* v. *United States*, 180 F. 2d 284 (C. A. 6) (embezzlement); *Smith* v. *United States*, 233 F. 2d 744 (C. A. 9) (embezzlement); *United States* v. *Sirugella*, 187 F. 2d 533, 534 (C. A. 2).[*] These courts have all adopted the definition given in *United States* v. *Adcock*, 49 F. Supp. 351, 353 (W. D. Ky.) (embezzlement):

> * * * that the word "stolen" is used in the statute not in the technical sense of what constitutes larceny, but in its well known and ac-

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[*] In the *Sirugella* case, a larceny was found to exist because the defendant-bailee intended to convert the automobile at the time the owner relinquished possession. However, Judge Augustus Hand said:

> Defendants say that a conviction under the Dyer Act cannot stand unless there is evidence sufficient to prove larceny under the narrowest definition of that crime at common law. Such a contention would not help the defendants even if it were sound—which we do not intend to intimate—for a narrow common law definition is not required under the Dyer Act. See *Davilman* v. *United States*, 6 Cir., 180 F. 2d 284; *Sturgeon* v. *United States*, 8 Cir., 151 F. 2d 386; *Lowry* v. *United States*, 10 Cir., 151 F. 2d [illegible]. * * *

> cepted meaning of taking the personal property of another for one's own use without right or law, and that such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it.

On the other hand, the Fifth, Eighth, and Tenth Circuits have considered "stolen" as synonymous with larceny and held that the statute covers only thefts which would constitute common-law larceny. *Murphy v. United States*, 206 F. 2d 571 (C. A. 5) (false pretenses); *Ackerson* v. *United States*, 185 F. 2d 485 (C. A. 8) (false pretenses); *Hite* v. *United States*, 168 F. 2d 973 (C. A. 10) (false pretenses). In these cases, the courts first noted that "stolen" was not defined in the statute and then proceeded to the common law to obtain a definition—a definition not of "stolen", however, but of larceny. Since "stolen" was not a technical term of the common law (see *infra*, pp. 6–10), the reliance of these courts upon the definition of larceny is apparently explainable only on the ground that larceny is one of the offenses included in the word "stealing" and somewhat close in meaning. It is urged that the strained construction placed on the Act by these courts, and by the District Court in the instant case, is neither sound nor supported by evidence of Congressional intent.

A. THE TERM "STOLEN" HAS NO COMMON-LAW DEFINITION AND HENCE AFFORDS NO BASIS FOR EQUATING THE SCOPE OF THE DYER ACT WITH THE SCOPE OF COMMON-LAW LARCENY.

It is true that a criminal statute must be strictly construed. It is also true that federal courts have

held that, when a federal criminal statute uses a term known to the common law and does not define that term, the courts will apply the common-law meaning to it unless a contrary intent by Congress is indicated (R. 8.). But the word "stolen" (or "stealing") has no common-law definition. *United States* v. *Handler*, 142 F. 2d 351, 353 (C. A. 2), certiorari denied, 323 U. S. 741 (prosecution under the National Stolen Property Act, 18 U. S. C. 415, now 18 U. S. C. 2314, 2315); *Crabb* v. *Zerbst*, 99 F. 2d 562, 563 (C. A. 5) (prosecution for stealing property of the United States, 18 U. S. C. 99, 100, now 18 U. S. C. 641). It was never equated with larceny at common law. *Boone* v. *United States*, 235 F. 2d 939, 940 (C. A. 4). Therefore, the courts which hold "stolen" to be coterminous with larceny, to the exclusion of other theft crimes, base their "strict construction" of the Dyer Act on a false premise and ignore the scope of the evil Congress sought to remedy.[3]

Since this problem is one of definition, the history of the word "stolen" becomes important. As the Court of Appeals for the Fourth Circuit (in which the District Court in the instant case is situated) recently pointed out in *Boone* v. *United States, supra*, at 940:

> * * * "Steal" (originally "stale") at first denoted in general usage a taking through secrecy, as implied in "stealth", or through stratagem,

[3] "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett*, 348 U. S. 503, 509–510; see also *United States* v. *Sullivan*, 332 U. S. 689, 693–694.

according to the Oxford English Dictionary. Expanded through the years, it became the generic designation for dishonest acquisition, but it never lost its initial connotation. Nor in law is "steal" or "stolen" a word of art. Blackstone does not mention "steal" in defining larceny—"the felonious taking and carrying away of the personal goods of another"—or in expounding its several elements. IV Commentaries 229 et seq.

Judge Hammond in *United States* v. *Stone*, 1881 C. C. W. D. Tenn., 8 F. 232, 247, concluded, "I do not find the word 'steal' used in defining larceny in any of the common-law authorities cited by Mr. Bishop, or elsewhere, from Lord Coke down", and again, "* * * it is not a technical word, in the strict sense of that term, but a common word applied to almost any unlawful taking, without regard to exactness of use or accurate technical terminology". See, too, *United States* v. *Jolly*, 1888 D. C. W. D. Tenn., 37 F. 108, 111. * * *

The District Court itself noted that "Black's Law Dictionary states that 'steal', besides being commonly used in indictments for larceny, may denote the criminal taking of personal property either by larceny, embezzlement or false pretenses, and may include the unlawful appropriation of things which are not technically the subject for larceny." The District Court also admitted that "this is probably the common, everyday meaning of the word" (R. 9). The court, however, failed to draw what we think is the inescapable conclusion from that fact, *i. e.*, that "stolen" as used in the Dyer Act includes any wrongful appro-

priation, whether or not it would constitute larceny at common law.[4]

The Fifth Circuit, although taking an opposing view under this statute, stated in *Crabb* v. *Zerbst*, 99 F. 2d 562, 565, in a prosecution for stealing government property:

> * * * Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership * * *.

See also *Morissette* v. *United States*, 342 U. S. 246, 260, involving a prosecution for stealing government property under 18 U. S. C. 641. Other cases which have declared that "stolen" has a broader scope than the technical term "larceny" include *United States* v. *O'Connell*, 165 F. 2d 697, 699 (C. A. 2), certiorari denied, 333 U. S. 964, and *United States* v. *DeNormand*, 149 F. 2d 622, 624 (C. A. 2), certiorari denied, 326 U. S. 756, 808, 811.[5] Cf. *United States* v. *Trosper*, 127 Fed. 476, 477 (S. D. Cal.).

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[4] The District Court evidently felt constrained to follow the holdings in what then constituted a majority of the circuits which had ruled on the question. Since the opinion of the District Court was rendered, both the Ninth Circuit in *Smith* v. *United States*, 233 F. 2d 744, and the Fourth Circuit (in which the District Court in the instant case is situated) in *Boone* v. *United States*, 235 F. 2d 939, have ruled that "stolen," as used in 18 U. S. C. 2312, is not restricted to those unlawful takings which amount to common-law larceny.

[5] Both the *O'Connell* and the *DeNormand* cases involved 18 U. S. C. 409 (now 18 U. S. C. 659), which penalized "whoever shall steal or shall unlawfully take" goods, baggage, or money comprising an interstate shipment.

Thus, the face of the statute, where the non-technical comprehensive word "stolen" is used, furnishes no basis for importing into the crime the technical limitations of common-law larceny. The common, ordinary word "stolen" should be given its common, ordinary meaning of any wrongful taking with intent to deprive the owner of his rights.

B. THE LEGISLATIVE HISTORY OF THE DYER ACT REFLECTS A CONGRESSIONAL UNDERSTANDING THAT THE TERM "STOLEN" IS DESCRIPTIVE OF ALL VEHICLES WRONGFULLY APPROPRIATED, WHETHER BY LARCENY, EMBEZZLEMENT, OR FALSE PRETENSES

Moreover, the legislative history of the Dyer Act supports the conclusion that Congress used the comprehensive, non-technical word "stolen" in its ordinary sense.

At the outset, it should be noted that Congress, far from using "stolen" as coterminous with common-law larceny, appears to have used the word as synonymous with "theft". And common-law larceny is, of course, only one type of "theft". See, *e. g.*, Bouvier's Law Dictionary (3d rev.), p. 3267. Thus, the enacting clause of the original Act (P. L. 70, 66th Cong., 1st Sess., Oct. 29, 1919, ch. 89, 41 Stat. 324) designates the Act as the National Motor Vehicle Theft Act. Again Mr. Dyer, who introduced the bill (H. R. 9203, 58 Cong. Rec. 5284), submitted an accompanying report (H. Rep. No. 312, 66th Cong., 1st Sess.) entitled *Theft of Automobiles*. See also 58 Cong. Rec. 6434.

Even more significant is the evil which Congress sought to remedy through the Act. As H. Rept. No. 312 (*supra*) states: "The purpose of the proposed law is to suppress crime in interstate commerce." See

58 Cong. Rec. 5472. Because of the problem created by the ending of state power at the state line, federal regulation was thought necessary. Congress was not concerned with common-law distinctions as to *how* possession of the "stolen" automobile had been obtained by the thief, but rather with the transportation of the automobile thereafter in the channels of interstate commerce. See 58 Cong. Rec. 5470–5478, 6433–6435.

As pointed out in *Smith* v. *United States*, 233 F. 2d 744, 747 (C. A. 9) (an embezzlement case like the instant one):

> * * * Automobile thieves may obtain cars in many ways. Typically an unattended car is taken. However, a thief may give a dealer a worthless check for a certificate of title. A trusted employee of an automobile dealer may have lawful possession of the stock of cars and later take them into another state and wrongfully sell them. These are larceny, false pretenses and embezzlement situations, but the evil is the same. The owner of the car is deprived of it, and state law is ineffective to protect him.
>
> Congress would have no reason to differentiate among the various theft crimes in view of its purposes in enacting Section 2312. The courts should not graft such a distinction on the statute.

In the instant case, the District Court quoted from House and Senate debates on the bill in support of its opinion that "stolen" is restricted in meaning to takings which amount to common-law larceny. The court stated (R. 7):

> Mr. NELSON. If the Senator from Iowa will allow me, I desire to say that if he will examine the authorities he will find that one of the elements of the offense of stealing is the deprivation of the owner of the thing stolen without his consent, and the words referred to by the Senator from Connecticut do no harm, though they are really surplusage. Their meaning is implied in the word "theft" or in the stealing. If the Senator will look at the textbooks he will find that a part of the element of the offense is depriving the owner thereof without his consent.

This statement merely indicates Senator Nelson's view—which we have no reason to challenge—that "stealing" in its ordinary sense imports a lack of consent on the part of the owner to the appropriation of his property. But this factor is an essential ele-

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ing it for the owner (and hence not "with intent to deprive the owner of the possession thereof"). The phrase was deleted because it was thought unnecessary since knowledge that the car was stolen was already an essential element of the offense under Section 4. As said by Senator Brandegee, who proposed the deletion:

> In other words, I think the insertion of the language to which I have called attention in section 4 throws a burden upon the Government which it is not necessary, in the interest of justice, to cast upon it, and provides a loophole for the accessory to the theft to escape penalty; * * *

For the reasons stated in the text, the deletion of the phrase in question has no bearing on the meaning of "stolen" in Section 3 (even apart from the fact that the phrase was never a part of Section 3). But to the extent that the Senate debate reveals that Congress was interested in preventing "loopholes" by which persons dealing with stolen cars could escape punishment, it illustrates the purpose to deal broadly with all types of wrongful takings.

clarifying amendment was not enacted, there is no basis for inferring that Congress approved the narrow reading of the *Hite* decision. Indeed, the following statement by the Senate Committee on the Judiciary (S. Rep. No. 358) in 1949, when an amendment was introduced to cover vehicles and aircraft "embezzled, feloniously converted or feloniously taken by fraud" (S. 1483, 81st Cong., 1st Sess.), indicates that Congress intended "stolen" to refer to all unlawfully acquired vehicles and disapproved of the narrow construction placed on the term by some courts:

> The present sections of the code herein referred to use the word "stolen" in defining the crime of transporting motor vehicles in interstate or foreign commerce. Some courts have construed the word "stolen" in such a narrow technical sense as not to include an embezzlement or other unlawful or felonious taking while other courts have placed a construction on it sufficiently broad as to include embezzled or otherwise unlawfully or feloniously taken vehicles.
>
> The Justice Department has sought to sustain the broad construction of the existing statute but has not been successful in certain jurisdictions because of existing controlling court decisions. This act will have the effect of making the statutes clearer than they now are, and will make the same acts illegal in all jurisdic-

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trailer and other device . . ."); H. R. 3429, H. R. 3817 (amendment would also include "tractors" with other vehicles), S. 487, S. 1483, 81st Cong., 1st Sess.; H. R. 2925 (tractors), 82d Cong., 1st Sess.; S. 675 (trailers and semi-trailers), 83d Cong., 1st Sess.; H. R. 3702, S. 660, 84th Cong., 2d Sess.

tions, thereby removing the presently existing confusion and uncertainty in the meaning and enforcement of the law. * * *

Since the limitations on the term "stolen" were implanted into the statute by judicial decision, contrary to what we think to be the intent of Congress as shown both by the language of the statute and its legislative history, and since those limitations have not been accepted by a majority of the courts of appeals that have passed on the issue, the failure of Congress to take action on the proposed clarifying amendments has no significance in relation to the problem now before this Court.[9] For the reasons set forth above, we think that, from the time of the enactment of the Motor Vehicle Theft Act in 1919, the term "stolen" was meant by Congress to encompass any wrongful appropriation with intent to deprive the owner of his rights in the property, and that the transportation across state lines of a vehicle thus wrongfully appropriated has been an offense under the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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DECEMBER 1956.

[9] Cf. *Girouard v. United States*, 328 U. S. 61, 69-70, where this Court said that it is "at best treacherous to find in congressional silence alone" the adoption of a court-made rule of law.

U. S. GOVERNMENT PRINTING OFFICE 1956

No. 289

IN THE

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OCTOBER TERM, 1956

UNITED STATES OF AMERICA,
Appellant,

v.

JAMES VERNON TURLEY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

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not to advocate allegiance to a rule of empty and meaningless technicality. It is consistent with the presumption that a statute of ambiguous or uncertain meaning is an adoption of and not in derogation or alteration of the common law.[18] It is uniquely adapted here to serving the salutary principle of strict construction of criminal statutes.[19] And of transcending importance here, it obviates the problem of constitutional objections to vagueness and uncertainty. *United States v. Miller*, 17 F. Supp. 65 (W.D. Ky.).

Such a constitutional problem exists if the word "stolen" is to be broadened beyond its common law meaning. To be sure, appellant and the cases upon which appellant relies do not make clear how they would have this statute read. Thus appellant urges the statute should be interpreted to cover "any unlawful taking" (Jurisdiction Statement, p. 4); "all situations where a vehicle is appropriated without right . . ." (App. Brief, p. 3); "any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership" (App. Brief, pp. 3-4); "any wrongful taking with intent to deprive the owner of his rights" (App. Brief, p. 10); "all types of wrongful takings" (App. Brief, p. 13, n. 6). *United States v. Adcock*, 49 F. Supp. 351, 353

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[18] See Crawford, *The Construction of Statutes*, 1940, sec. 228.

[19] It is true that no citations are necessary to show that criminal statutes should be strictly construed. But in this context we think the statement of Mr. Justice Frankfurter particularly in point: "Not that penal statutes are not subject to the basic considerations that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States v. Universal Corporation*, 344 U.S. 218, 221.

(W.D. Ky.), whose definition appellant says the Second, Fourth, Sixth and Ninth Circuits have adopted (App. Brief, p. 5), extends the statute to any taking "without right or law . . .". But neither the *Adcock* case nor any other so holding gives definition to the limits of the coverage of the Act as so read, or shows any awareness of the problems raised thereby.

Let us read the statute to include all of these definitions, that is, as though it said "knowing the same to have been unlawfully, wrongfully or dishonestly taken without right". Each of these terms is vulnerable to serious objection, whether standing alone or used conjunctively or disjunctively with the others.

If the word "unlawfully" be considered, the question arises, under what law? If not the common law only, the Dyer Act becomes wedded to the statutory extensions of the several states, for there are no federal statutory extensions branding unlawful the taking of automobiles which can be incorporated here, nor any guides as to what provisions of other federal criminal statutes are intended to apply. But when Congress has desired to incorporate state laws into federal statutes it has done so specifically: e.g. 18 U.S.C., secs. 43, 1073, 1262, 5001; 15 U.S.C., sec. 715b. So extending this statute would necessitate an examination in each instance of state statutory law to determine if under that law the taking was "unlawful". A state could alter at will the coverage of the Dyer Act by legislating additions to or subtractions from its own proscriptions against "unlawful" taking.[20] To so interpret the Dyer Act would be to destroy the overriding principle of uniformity of federal statutes. *Jerome v. United States*, 318 U.S. 101; *United*

[20] Cf. *United States v. Brandenburg*, 144 F. 2d 656, 660.

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UNITED STATES OF AMERICA,

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JAMES VERNON TURLEY,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

SUMMARY OF ARGUMENT

Appellee contends the term "stolen", as used in the National Motor Vehicle Theft (Dyer) Act, encompasses only those situations where a vehicle transported in commerce has been appropriated under circumstances amounting to larceny as generally understood at common law. This is the holding of the Courts of Appeals for the Fifth, Eighth and Tenth Circuits and District Courts elsewhere. Decisions to the contrary are not persuasive.

A. The legislative history of the Act shows Congressional intent to combat the increasing theft of automobiles by

professional thieves and dealers operating across state lines — activities falling well within the scope of larceny at common law. Language used during debate on the Act indicates that discussion was within the framework of common law larceny. Even the word "theft" in the Act's title is a synonym for "larceny" in its common law sense. Failure of Congress on repeated occasions to amend the Act to include language specifically covering embezzlement, false pretenses and the like, as requested by the Department of Justice, shows that Congress did not intend it to encompass such offenses.

B. Use of the word "stolen" further shows Congressional intent, for the word "stolen" is a word of art, synonymous with "larceny" as defined at common law. It was so used at common law and so defined by numerous cases decided in this country prior to passage of the Dyer Act. It is a well settled rule of statutory construction, enunciated by many cases, that when such a common law term is used without definition in a statute, the term takes its common law meaning. The contrary not appearing, Congress must be presumed to have adopted the meaning of the word "stolen" as defined by this body of law. Had it wished the Dyer Act to cover offenses other than common law larceny, it could easily have used language clearly indicating that intention, as it has in many other statutes.

C. To supply by judicial interpretation such legislative omissions would be violative of the principles of strict construction of criminal statutes and would, in the case of the Dyer Act, run contrary to the primary consideration of its uniformity of application. Broadly interpreting the Act would make it dependent upon the various statutory definitions of unlawful taking in the several states. Otherwise the indefiniteness of the Act as broadly interpreted would raise serious constitutional questions.

D. The cases which have broadly interpreted the Act have failed to realize the distinction between a common law term standing undefined in a statute and one which is given special meaning in the statute itself. Without exception they have failed to give adequate consideration to the effect of their interpretations upon the administration and constitutionality of the Act.

ARGUMENT

The Term "Stolen", as Used in the Dyer Act, Encompasses Only Those Misappropriations Amounting to Larceny as Generally Understood at Common Law.

Appellee contends that the court below was correct in determining that Congress used the word "stolen" in the Dyer Act, 18 U.S.C. 2312, in the sense of larceny as defined by the common law.[1] This construction of the statute is the essence of the holdings of the Court of Appeals for the Fifth Circuit in *Murphy v. United States*, 206 F. 2d 571, the Eighth Circuit in *Ackerson v. United States*, 185 F. 2d 485, and the Tenth Circuit in *Hite v. United States*, 168 F. 2d 973.[2] These courts have found the word "stolen" to be a term having a common law meaning coterminous with common law larceny, and have applied the well settled rule that when a common law term is used in a statute it takes its common law meaning unless the statute clearly indi-

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[1] Comparison of the lower court's opinion, *United States v. Turley*, 141 F. Supp. 527 (R. 5-20) with the other opinions in this field, is sufficient to demonstrate that the lower court examined more fully than any other court has yet done the considerations entering into a determination of this Congressional intent.

[2] The same view has been adopted by a District Court in the Seventh Circuit (see *United States v. Bucur*, 194 F. 2d 298, 300, n. 1), by a District Court in the Eighth Circuit prior to the similar *Ackerson* decision (*United States v. O'Carter*, 91 F. Supp. 544, S.D. Iowa), and by another District Court in the Fourth Circuit prior to the Fourth Circuit's contrary decision in *Boone v. United States*, 235 F. 2d 939 (*Ex Parte Atkinson*, 84 F. Supp. 300, E.D.S.C.).

cates the contrary. Those decisions which have adopted a different view of the Dyer Act[3] have misconstrued the precedents upon which they rely and have failed to consider the grave problems of application raised by their giving a broad and largely undefined coverage to the Act.

A. The Legislative History Of The Dyer Act Is Consistent With The View That The Word "Stolen" Was Intended To Have A Meaning Synonymous With Larceny As Generally Understood At Common Law.

Neither in Mr. Dyer's report to the House[4] nor in the debates on the floor of Congress[5] is there any indication that direct consideration was given to the meaning of the word "stolen" in the Dyer Act. Nevertheless, what evidence of legislative intention there is to be found in the reports of the Congress lends credence to, and does not detract from, the view of appellee that the Act encompasses only common law larceny.

Mr. Dyer's report, in discussing the need for the Act, states: "Thieves steal automobiles and take them from one state to another and ofttimes have associates in this crime who receive and sell the stolen machines . . ." This language seems in accord with the finding of the court below that "The primary purpose of the Dyer Act was to combat effectively the rising traffic in stolen cars by organized

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[3] *Boone v. United States*, 235 F. 2d 939 (C.A. 4); *Breece v. United States*, 218 F. 2d 819 (C.A. 6); *Wilson v. United States*, 214 F. 2d 313 (C.A. 6); *Collier v. United States*, 190 F. 2d 473 (C.A. 6); *Davilman v. United States*, 180 F. 2d 284 (C.A. 6); *Smith v. United States*, 233 F. 2d 744 (C.A. 9); *United States v. Adcock*, 49 F. Supp. 351 (W.D. Ky.); cf. *dictum*, *United States v. Sicurella*, 187 F. 2d 533 (C.A. 2). These cases are discussed at page 17, et seq.

[4] H. Rep. No. 312, 66th Cong., 1st Sess.

[5] 58 Cong. Rec. 5470-5478, 6433-6435.

groups of thieves and dealers operating across state lines; this traffic usually involves common law larceny."[6]

During the Senate debate respecting the phrase subsequently deleted from Section 4 of the Act, "That whoever shall, *with the intent to deprive the owner of the possession thereof,* receive, etc." (emphasis added), Senator Nelson noted that the italicized phrase was surplusage because one of the elements of the offense of stealing was deprivation from the owner of the thing stolen without his consent, and that this was a "textbook" definition.[7] In speaking of such a "textbook" definition, the Senator must have had reference to treatises setting forth the settled principles of common law larceny.

Appellant draws upon the use of the word "theft" in the title of the Act and in the title of Mr. Dyer's accompanying report to the Congress to urge that Congress used the word "stolen" in the body of the Act as synonymous with "theft" rather than with common law larceny (App. Brief, pp. 4, 10). But "theft" is itself a term synonymous with larceny at common law. It was clearly so used by Blackstone: "Larceny, or *theft,* by contraction for latrociny, *latrocinium,* is distinguished by the law into two sorts . . .", 4 *Commentaries* 229. "At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition", 4 *Commentaries* 230.[8]

"Theft" is equatable with "stolen", but neither imply the embezzlement charged by the information in the present

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[6] 141 F. 2d 529. And in *Smith v. United States,* 233 F. 2d 744, 747 (C.A. 9), the Court admitted that Congress was primarily concerned with misappropriations which would have been larceny at common law. See n. 27, *infra.*

[7] 58 Cong. Rec. 6434, quoted in Appellant's Brief, p. 13.

[8] Others have said that to Blackstone theft and larceny were one: *People v. Donohue,* 84 N.Y. 438, 442; *Mathews v. State,* 36 Tex. 675, 676.

case. In *United States v. Thomas*, 1895, 69 Fed. 588, 590, (S.D. Cal.), the Court said:

> "The terms 'theft' and 'embezzlement' cannot characterize the same act, because they are repugnant to, and irreconcilable with, each other . . . the charge in the indictment is that the defendant knew that the draft was stolen and embezzled; and . . . this last allegation (is) . . . the statement of a manifest impossibility, and therefore nugatory . . ."[9]

Thus, use of the word "theft" as indicated is consistent with appellee's view that Congress intended to cover only common law larceny in the Dyer Act.

With commendable candor appellant has called attention to the several efforts of the Department of Justice to amend the Dyer Act by insertion (after the word "stolen") of such words as "embezzled, feloniously converted or feloniously taken by fraud" (App. Brief, pp. 14-16). Failure of passage of these amendments may be considered in the search for the meaning of the original Act. *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87. Existing uncertainties of meaning engendered by the conflict among judicial circuits would have given Congress every reason to adopt, and none to reject, such amendments had they represented a clarification only, rather than a change, in the intended meaning of the original Act. Appellee can only conclude that such words represented an unwanted addition to the scope of the Act.[10] No argument is needed to demonstrate

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[9] Other courts agree. See, e.g., *Pearce v. The State*, 1906, 50 Tex. Crim. Rep. 507, 509, 98 S.W. 861, 862 (". . . this is a case of embezzlement and not of theft."); *State v. Hanley*, 1898, 70 Conn. 265, 269, 39 Atl. 148, 149 (saying theft is larceny, not embezzlement); *State v. Fair*, 1904, 35 Wash. 127, 134, 76 P. 731, 733 (". . . larceny is only another name for stealing or theft.")

[10] Cf. *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, holding that rejection by the legislature of an attempt by an administrative agency to secure specific statutory authority implies prior absence of authority.

that the language of the 1949 Senate Committee report referred to by appellant (App. Brief, pp. 15-16) does not indicate otherwise.

Appellee concludes, therefore, that the legislative history of the Dyer Act indicates that Congress intended it to cover only common law larceny.

B. It Must Be Presumed That Congress, In Failing To Give Special Meaning In The Dyer Act To The Word "Stolen", Intended To Adopt The Settled Judicial Construction Of That Word When So Used As A Word Of Art Synonymous With Larceny At Common Law.

In the absence of decisive indications of Congressional intent in the legislative history of the Dyer Act, it becomes of great importance to examine the meaning of the word "stolen" at common law and to determine through application of settled rules of statutory construction whether that meaning was adopted in the statute.

In *Hite v. United States*, 168 F. 2d 973, 975 (C.A. 10), the Court said:

> "The word 'steal' in a criminal statute ordinarily imports the common law offense of larceny."

With this statement the Courts of Appeals for the Eighth and Tenth Circuits agree.[11] Ample authority supports their position.

In *State v. Uhler*, 1916, 32 N.D. 483, 502, 156 N.W. 220, 226, "steal" was declared to be "a word of art", importing common law larceny when used in a criminal statute and not defined by the text.

In *State v. Richmond*, 1910, 228 Mo. 362, 365, 128 S.W. 744, 745, the Court said:

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[11] See cases cited in text, and n. 2, *supra*, p. 3.

" 'The word "steal" or "stealing" in a criminal statute when unqualified by the context, signifies a taking which at common law would have been denominated felonious and imports the common law offense of larceny.' The American and English Encyclopedia of Law, vol. 23, p. 555, says: 'The word "steal" has a uniform signification and in common as well as in legal parlance means the felonious taking and carrying away of the personal goods of another.'

". . . In *Hughes v. Territory*, 8 Okla. 32, it is said: 'An examination of the authorities will show that "larceny" and "stealing", at common law, had the same meaning', and such we think is the common understanding. (*State v. Schartz*, 71 Mo. l. c. 504)."[12]

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[12] The cited case, *Hughes v. Territory*, 1899, 8 Okla. Terr. 28, 30-32, contains this significant discussion:

"What did the legislature mean when it used the word 'steal'? There is nothing about the act in which the word appears to indicate that it was intended to place upon it a meaning different from that given to it in its ordinary and legal use. As this word is not defined by our statutes, we will have to look to the lexicographers and law writers for light as to its meaning. The American and English Encyclopedia of Law (volume 23, p. 555) says: 'The word "steal" has a uniform signification, and in common, as well as legal, parlance, means the felonious taking and carrying away of the personal goods of another.' And. Law Dict.: 'Steal: To commit larceny.' Webster's International Dictionary defines the word thus: 'Steal: To take and carry away feloniously; to take without right or leave, and with intent to keep feloniously; as to steal the personal goods of another; to practice, or be guilty of, theft; to commit larceny or theft.' The same author defines 'larceny' to be 'the unlawful taking and carrying away of things personal, with intent to deprive the right owner of the same; theft.' Blackstone uses the words 'larceny', 'steal' or 'stealing', and 'theft', interchangeably. American and English Encyclopedia of Law (volume 12, p. 761): 'Larceny is the wrongful and fraudulent taking and carrying away, by any person, of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) use, and make them his property, without the consent of the owner. As a general rule, "stealing" and "larceny" are synonymous terms,' etc. Bishop, in his work on Criminal Law, (volume 1, p. 431), defines larceny to be 'the taking and removing, by trespass, of personal property, which the trespasser knows to belong, either generally or specially, to another, with the intent to deprive such owner of his owner-

Likewise, in *Gardner v. State*, 1892, 55 N.J.L. 17, 24, we find:

> "Nor is there any ambiguity or uncertainty in the meaning of the word 'steal' in an indictment charging crime. In many of our criminal statutes the word 'steal', 'stealing' or 'stolen' is used without being characterized or qualified by an adverb or adjective; and this mode of drafting criminal statutes extends back into colonial times. *Leam & Spi.* 105. In Dunnell v. Fisk, 11 Metc. 551, 554, Chief Justice Shaw says: 'The natural and most obvious import of the word "steal" is that of a felonious taking of property, or larceny; but it may be qualified by the context.' The word 'steal' or 'stealing' in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated felonious, and imports the common law offense of larceny.".

And in *Satterfield v. Commonwealth*, 1906, 105 Va. 867, 869, 52 S.E. 979, 980, the Court stated:

> "The definition of Webster and other lexicographers of the verb 'to steal' is 'to take and carry away feloni-

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ship therein, and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious.' 2 Russ. Crimes, p. 146: 'In a late work of great learning and research, larceny is defined to be "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner, and in a case of recent occurrence, which was reserved for the consideration of the twelve judges, the learned judge who delivered the opinion said that the true meaning of larceny is the 'felonious taking the property of another, without his consent, and against his will, with intent to convert it to the use of the taker.'"'

"An examination of the authorities will show that 'larceny' and 'stealing', at common law, had the same meaning; and consequently stealing, as here defined, is the wrongful or fraudulent taking and removing of personal property, by trespass, with a felonious intent to deprive the owner thereof, and to convert the same to his (the taker's) own use . . ."

ously', and the words 'steal' and 'larceny' are synonyms."

Again, in *Cohoe v. State*, 1907, 79 Neb. 811, 814, 113 N.W. 532, 533, it is said:

> "The section does not define 'larceny', and does not prescribe what acts shall constitute 'stealing', and early in the jurisprudence of this state it was decided that resort must be had to the common law to ascertain the constituent elements of the crime. *Thompson v. People*, 4 Neb. 528. And in *Barnes v. State*, 40 Neb. 546, 59 N.W. 125, it was determined that the word 'steal' as used in this section of the criminal code, includes all the elements of larceny at common law, . . ."[13]

This Court, in *Morissette v. United States*, 342 U.S. 246, 271, in effect equated "steal" with common law larceny when it said:

> "Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully.*' (Italics added.) *Irving Trust Co. v. Leff*, 253 N.Y. 359, 364, 171 N.E. 569, 571."

This definition of steal does not embody the offense of embezzlement, for the latter does not involve a taking from one in lawful possession.[14]

Thus it appears that at the time of the passage of the Dyer Act the word "steal" had a settled judicial meaning synonymous with larceny at common law. Likewise it is well settled that when a common law term is employed in

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[13] See also *State v. Chambers*, 1849, 2 Greene (Iowa) 308; *State v. Frost*, Mo. 1926, 289 S.W. 895; *Riley v. State*, 1938, 64 Okla. Cr. 183, 78 P. 2d 712; *State v. Gugel*, 1935, 65 N.D. 587, 260 N.W. 581; *State v. Tough*, 1903, 12 N.D. 425, 96 N.W. 1025.

[14] See *Moore v. United States*, 160 U.S. 268.

a criminal statute and is not defined by that statute, the common law meaning prevails. In *United States v. Cardish*, 1906, 143 Fed. 640, 642, (E.D. Wis.), the court said:

> "It is hardly conceivable that Congress would have contented itself with the employment of the technical term 'arson', having a well understood significance in law, if it had intended to include all statutory offenses of kindred nature.
>
> "The rule seems to be well settled that when Congress by statute refers to or adopts a common law offense, without further definition, the common law definition must obtain . . ."[15]

Had Congress wished the Dyer Act to cover other than common law larceny, it could have broadened its coverage beyond that afforded by use of the word "stolen" standing alone, through the simple addition of other words similar to those used by it in many other criminal statutes. Examples of such phraseology are set out in the footnote.[16]

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[15] Many cases so hold: *Keck v. United States*, 172 U.S. 434 (smuggling); *Harrison v. United States*, 163 U.S. 140 (robbery); *United States v. Carll*, 105 U.S. 611 (forgery); *United States v. Smith*, 5 Wheat. 153 (piracy); *United States v. Palmer*, 3 Wheat. 610 (robbery); *United States v. Brandenburg*, 144 F. 2d 656 (C.A. 3) (burglary); *United States v. Patton*, 120 F. 2d 73 (C.A. 3) (larceny); *United States v. Outerbridge*, Fed. Cas. No. 15,978 (murder); *United States v. Armstrong*, 2 Curt. 451, Fed. Cas. No. 14,467 (manslaughter); *In re Greene*, 52 Fed. 104 (C.C.S.D. Ohio); *United States v. Coppersmith*, 4 Fed. 198 (C.C.W.D. Tenn.) (felony); *United States v. Clark*, 46 Fed. 633; *United States v. Altmeyer*, 113 F. Supp. 854 (D.C.W.D. Pa.) (extortion).

[16] 18 U.S.C. sec. 641: "embezzles, steals, purloins, or knowingly converts . . ." (public money, property or records); 18 U.S.C. sec. 642: "secretes within, or embezzles, or takes and carries away . . ." (tools and materials of U.S. for counterfeiting purposes); 18 U.S.C. sec. 655: "steals or unlawfully takes, or unlawfully conceals . . ." (money, etc. by bank examiner); 18 U.S.C. sec. 656: "embezzles, abstracts, purloins, or willfully misapplies . . ." (money, etc. by bank employee); 18 U.S.C. sec. 657: "embezzles, abstracts, purloins, or willfully misapplies . . ." (money etc. by employee of federal lending, etc. institution); 18 U.S.C. sec. 658: "conceals, removes, disposes of,

Common law meanings aside, this Court has said that a word having a judicially settled meaning is presumed to have been used in that sense in a statute. *United States v. Merriam*, 263 U.S. 179.[17] Here, in the absence of any indication to the contrary, it must be presumed that Congress used the word "steal" in accordance with settled principles of statutory construction and as defined by the existing body of judicial decisions, i.e., as a term meaning common law larceny.

C. To Hold That The Word "Stolen" Encompasses All "Unlawful", "Wrongful" Or "Dishonest" Takings Would Violate The Principle Of Strict Construction Of Criminal Statutes And Would Either Destroy The Uniformity Of The Act's Application Or Raise Grave Doubts As To Its Constitutionality.

To say that the word "steal" is a common law term which must be presumed to have been used in the Dyer Act in its common law sense because it is undefined by the text is

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or converts . . ." (property of farm credit agency); 18 U.S.C. sec. 659: "embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains . . ." (baggage moving in commerce); 18 U.S.C. sec. 660: "embezzles, steals, abstracts, or willfully misapplies . . ." (funds of carrier); 18 U.S.C. sec. 663: "embezzling, stealing, or purloining such gift, or converting the same . . ." (money solicited for United States); 18 U.S.C. sec. 1704: "steals, purloins, embezzles, or obtains by false pretenses . . ." (keys or locks — mail containers); 18 U.S.C. sec. 1707: "steals, purloins, or embezzles . . . or appropriates . . . to . . . any other than its proper use . . ." (post office property); 18 U.S.C. sec. 1708: "steals, takes, or abstracts, or by fraud or deception obtains . . ." (mail matter); 18 U.S.C. sec. 2314: "knowing the same to have been stolen, converted or taken by fraud . . ." (transportation of articles used in counterfeiting); 18 U.S.C. sec. 2315: "knowing the same to have been stolen, unlawfully converted, or taken . . ." (sale or receipt of such articles).

[17] Accord, *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, *rehearing denied*, 308 U.S. 637; *Coates v. United States*, 181 F. 2d 816 (C.A. 8).

States v. Handler, 142 F. 2d 351 (C.A. 2).[21] Indeed, appellant has admitted that "the word 'stolen' as used in the statute should be given a uniform meaning throughout the country." (Jurisdictional Statement, p. 3).

In addition the word "unlawfully" raises the question whether all unlawful takings under the statutory extensions are to be included. If so, this would include within the Dyer Act those takings without permission motivated by mischief, or with intent to shortly return — the so-called "joy riding" offense. "Joy riding" has been summarily rejected from the scope of the word "steal". *United States v. Trinder*, 1 F. Supp. 659 (D. Mont.). Cf. *Morissette v. United States*, 342 U.S. 246, 271; *United States v. Kemble*, 197 F. 2d 316 (C.A. 3). We know of no case to the contrary, nor can we conceive that Congress intended this type of taking to be within the Dyer Act. Yet it should logically be so if Congress equated "stolen" with "unlawfully taken".

To equate "stolen" with "wrongfully taken", "dishonestly taken" or "taken without right" raises grave constitutional questions, for there is no accurate and exact definition of these words known to the law. If they mean only "unlawful" the questions discussed above arise. If they involve a moral concept, there can be little doubt of their vagueness and uncertainty.

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[21] The court below noted "Some states have passed statutes broadening the definition of larceny and wiping out the distinctions between the old common law crimes. But there has been no uniformity in such statutes . . ." 141 F. Supp. 531. Cf. 2 *Clark & Marshall on Crimes*, 1900, Section 341: "Embezzlement is a statutory and not a common law offense. The statutes vary so much in the different jurisdictions that it is impossible to frame a definition that will apply in all . . ."

The difficulty is pointed up by two Eighth Circuit cases, *Carpenter v. United States*, 113 F. 2d 692, and *Abraham v. United States*, 15 F. 2d 911, where the court examined the statute law of the states where the offenses occurred to determine guilt under the Dyer Act. Thereafter the court, in *Ackerson v. United States*, 185 F. 2d 485, gave "stolen" its common law meaning.

Circuit Judge Biggs, writing for a three judge court in *International Longshoremen's and Warehousemen's Union v. Ackerman*, 82 F. Supp. 65, 105 (D. Hawaii),[22] said:

> "The clause of Section 11120 referred to makes two or more persons guilty of conspiracy if they concert together to do '* * * what is obviously and directly wrongfully injurious to another * * *' and renders the section too vague to withstand attack. The word 'wrongfully' is not a term of art in the criminal law. It means 'In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice.' Bouvier's Law Dictionary, Rawle's Third Revision. Cf. the term *'Wrong'*, Black's Law Dictionary, Third Edition. The test supplied by the statute is, therefore, one of moral law. . . . This portion of the statute clearly does not meet the test of certainty."

It is well settled that when two interpretations of a statute are possible, this Court will adopt that construction which avoids any grave danger of unconstitutionality. This does not mean that the Court must decide the constitutional issue first; the duty is to avoid danger of unconstitutionality. *United States v. C.I.O.*, 335 U.S. 106, 120-121; *United States v. Standard Brewery*, 251 U.S. 210, 220; *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 407-408. Here this means interpreting "stolen" as coterminous with common law larceny. To hold otherwise is to raise grave doubt of constitutionality.[23]

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[22] *Rev'd on other grounds, Ackerman v. International Longshoremen's and Warehousemen's Union*, 187 F. 2d 860 (C.A. 9), *cert. denied*, 342 U.S. 859.

[23] Cf. *Connally v. General Construction Co.*, 269 U.S. 385, 391, quoted with approval, *Lanzetta v. New Jersey*, 306 U.S. 451, 453:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague

D. The Cases Broadly Interpreting The Dyer Act Have Misconstrued The Precedents Upon Which They Rely, And Have Failed To Adequately Consider The Effect Of Their Interpretations Upon The Administration And Constitutionality Of The Act.

The cases giving broad effect to the word "stolen" in the Dyer Act all stem from the decision of District Judge Miller in *United States v. Adcock*, 1943, 49 F. Supp. 351 (W.D. Ky.). Judge Miller found the term to have "the well known and accepted meaning of taking the personal property of another for one's own use, without right or law."[24] In support of this definition are cited *United States v. Trosper*, 127 Fed. 476 (S.D. Cal.); *Russell v. United States*, 119 F. 2d 686 (C.A. 8); and *Isbell v. United States*, 26 F. 2d 24 (C.A. 8). The *Trosper* case, however, involved Rev. St. sec. 5469, which condemned anyone who "shall steal", "shall take", or "shall by fraud or deception obtain" United States mail. Here the intention of Congress to cover more than common law larceny is clear.[25] The *Russell* and *Isbell* cases involved offenses which were clearly common law offenses. Certainly the Eighth Circuit does not draw Judge Miller's conclusion from its decisions in *Russell* and *Isbell*, for the Eighth Circuit has held the Dyer Act to cover only common law larceny. *Ackerson v. United States*, 1950, 185 F. 2d 485.

Since Judge Miller's decision (and after his rise to the bench of the Sixth Circuit), the Sixth Circuit has followed

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that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

[24] 49 F. Supp. 353. The fact that this definition either forces a dependence upon state statutory law and destroys the uniform application of the Dyer Act, or else may render the Act unconstitutional, is discussed herein at pages 12-16. The Court showed no awareness of this problem.

[25] See discussion, pp. 19-20.

the *Adcock* case on four occasions.[26] The first, *Davilman v. United States*, 1950, 180 F. 2d 284, is a one paragraph *per curiam* adoption of the *Adcock* opinion. None of the cases cites supporting authority outside the Sixth Circuit other than *United States v. Sicurella*, 1951, 187 F. 2d 533 (C.A. 2), which contains a one sentence dictum by Judge A. Hand stating that "a narrow common law definition is not required under the Dyer Act." But in *United States v. Shailer*, 1953, 202 F. 2d 590, *cert. denied*, 347 U.S. 947, the Second Circuit, faced with a situation where it could have easily disposed of its case by adopting this dictum, chose not to refer to the *Sicurella* opinion in any way and to decide the case on other grounds.

Four days after the decision of the District Court in this case, the Ninth Circuit decided *Smith v. United States*, 233 F. 2d 744, and became the second Circuit to adopt as law a broad interpretation of the word "stolen" in the Dyer Act. In the *Smith* case the court quoted from *Adcock*, *supra*, and stated that since automobiles may be obtained by thieves in many ways, "Congress would have no reason to differentiate among the various theft crimes . . ."[27] Like its predecessors, this brief opinion evidences scant consideration of the issues involved.

The most recent Dyer Act opinion is *Boone v. United States*, 1956, (4th Cir.), 235 F. 2d 939, which again quotes and relies upon Judge Miller's statement in the *Adcock* case. But the Court examines more fully than did the other

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[26] *Davilman v. United States*, 1950, 180 F. 2d 284; *Collier v. United States*, 1951, 190 F. 2d 473; *Breece v. United States*, 1954, 218 F. 2d 819; *Wilson v. United States*, 1954, 214 F. 2d 313.

[27] 233 F. 2d 747. The court, however, admits that typically an unattended car is taken, and "it must be conceded that this was the situation which particularly concerned Congress in the debates on the bill . . ." 233 F. 2d 747.

Circuits the meaning of the word "stolen" and concludes that the word had no certain definition at common law. The case law cited in support of this conclusion is *United States v. Stone*, 1881, 8 Fed. 232 (C.C.W.D. Tenn.); *United States v. Jolly*, 1888, 37 Fed. 108 (D.C.W.D. Tenn.); and *Crabb v. Zerbst*, 1938, 99 F. 2d 562 (C.A. 5). Appellee cannot agree that these cases are authority for a broad interpretation of "stolen" in the Dyer Act. Each of these cases involved a statute containing words additional to "steal" which clearly indicated a Congressional intent to broaden the scope of the statute beyond common law larceny.[28] It should be reiterated that appellee does not contend that "stolen" *cannot* be used in a statute in a sense broader than common law larceny, but only that it takes the latter meaning when otherwise undefined.

This distinction is clearly pointed out by the judge himself in one of the cases heavily relied upon by the Fourth Circuit and by appellant here, for in *United States v. Stone*, *supra*, at 249, Judge Hammond says:

> "If Congress had said that every person who shall *steal* goods belonging to a wreck, using no other words, I should probably hold it to denounce only acts constituting larceny at common law, in obedience to our familiar rule of construction that when Congress defines a crime by only using its common law name, we

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[28] The same is true of other cases cited by appellant in its brief: *United States v. O'Connell*, 165 F. 2d 697 (C.A. 2), *cert. denied*, 333 U.S. 964; *United States v. De Normand*, 149 F. 2d 622 (C.A. 2), *cert. denied*, 326 U.S. 756, 808, 811; *United States v. Handler*, 142 F. 2d 351 (C.A. 2), *cert. denied*, 323 U.S. 741. In the latter case the court noted that a House Amendment to the National Stolen Property Act adding the words "or taken feloniously by fraud or with intent to steal or purloin" was a clear indication of intent to broaden the statute beyond "what would have been reached by the word 'stolen' ". 142 F. 2d 353.

> interpret it by the common law. Associated, as in this statute, with 'plunder' and 'destroy' I have no doubt it means a great deal more . . ."[29]

In this connection it is significant that the Fifth Circuit, while giving a broad interpretation to the statute involved in *Crabb v. Zerbst, supra,* held in *Murphy v. United States,* 206 F. 2d 571, that "stolen" as used in the Dyer Act encompasses only common law larceny.[30]

In the *Boone* case the court also makes much of the fact that 18 U.S.C. sec. 659, which brands as criminal one who "embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains" goods or chattels from commerce, groups all the above at two points in its text under the phrase "embezzled or stolen". "Thus", says the court, "Congress expected 'stolen' to embody 'fraud or deception'."[31] That is true, but it is not true that this is a key to the meaning of "stolen" in the Dyer Act, for in sec. 659 "stolen" is given a broad meaning on the face of the statute.[32]

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[29] Cf. cases cited by Judge Hammond at 8 Fed. 248, illustrating that "steal" used alone in a statute means common law larceny, contra when joined with words broader in scope.

[30] Cf. *United States v. Morgan,* 98 F. Supp. 558 (D. Ark.), holding that the breadth of language used in 18 U.S.C. sec. 659 made inapplicable a strict construction similar to that given the Dyer Act in *Hite v. United States,* 168 F. 2d 973 (C.A. 10).

[31] 235 F. 2d 941.

[32] The *Boone* case involved a taking by false pretenses. The present case involves embezzlement. If the court in the *Boone* case is correct in saying with respect to the Dyer Act and sec. 659 that "The Congressional intent is disclosed by the contemporaneous use of the same expression in a related statute" (235 F. 2d 941), then the Dyer Act cannot cover the present case, since in sec. 659 it is surely true that whatever "stolen" encompasses in the phrase "embezzled or stolen", it does not encompass embezzlement.

Thus it appears that no court broadly interpreting the Dyer Act has grasped the significance of the difference in the language of that Act and the language of the statutes involved in the cases which are cited as precedent. Neither have they considered the effect of a broad interpretation of the Act upon its administration and constitutionality. It follows that the authority of these cases should not weigh heavily with this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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